1989

Tech-Fluid Services, Inc. v. Gavilan Operating Incorporated, Pauite Oil & Mining Corp, et al. : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF UTAH

TECH-FLUID SERVICES, INC.,	:	89-0067-CA
Plaintiff/Appellant,	:	
vs.	:	Case No. 880090
GAVILAN OPERATING INCORPORATED, PAUITE OIL & MINING CORP., et al.	:	Category No. 14b
Defendants/Respondents.	:	

BRIEF OF APPELLANT

APPEAL FROM AN ORDER OF THE SEVENTH JUDICIAL DISTRICT
COURT OF DUCHESNE COUNTY, STATE OF UTAH
The Honorable Dennis L. Draney, Presiding

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JURISDICTION

This Court has jurisdiction over this appeal pursuant to §78-2-2(3)(i) as this is an appeal from a final order of the Seventh Judicial District Court for Duchesne County concerning title to real property.

STATEMENT OF ISSUES

I. Does ownership of a debtor's right of redemption pass to the debtor's bankruptcy estate upon filing of a petition for relief if the property in question was under foreclosure at the time of filing but had not been sold?

A. If the bankruptcy trustee abandons the "bankrupt's interest" in real property pursuant to 11 U.S.C.

554, does the trustee also automatically abandon the rights of redemption to that property?

B. Is a right of redemption to real property a right personal to the debtor or a right attached to real property subject to redemption?

C. Is a redemption right an asset that arises after a foreclosure that constitutes an after acquired asset of the bankrupt's estate, pursuant to 11 U.S.C. 541(a)(7)?

II. Is a right of redemption to real property an asset subject to execution under Utah law?

III. In order to redeem real property under Rule 69, Utah Rules of Civil Procedure, must a redemptor strictly comply or substantially comply with the procedural requirements of Rule 69, U.R.C.P., and was the Court's Ruling of substantial compliance justified under the facts of this case?

IV. In order to properly redeem under Rule 69(f)(3) must the redemptor post the amount of the sale bid price or the amount of the underlying lien in order to extinguish the underlying debt?

DETERMINATIVE STATUTES AND RULES

See Statutory Appendix.

STATEMENT OF THE CASE

1. Appellant Tech-Fluid Services, Inc. is a corporation in the business of providing oil well services to wells in the eastern Utah area. (R.1)

2. Paiute Oil and Walker Energy (not parties to this appeal) were the owner of mineral interests in the following described real property: (R.1)

> Section 13, Township 3 South, Range 5 West, 820 FNL 932 FEL, Duchesne County, known as Paiute-Walker #13-ND-1.

3. On August 16, 1984, Tech-Fluid provided services, equipment and labor to the Paiute well pursuant to contract between Tech-Fluid and Paiute Oil.

4. Tech-Fluid provided material and labor worth $69,708.30. Paiute did not pay for any of the materials, labor or services rendered to it by Tech-Fluid. (R.2)

5. Tech-Fluid filed an Amended Notice of Lien with the Duchesne County Recorder's Office on November 30, 1984. (R.2)

6. On January 24, 1984, Tech-Fluid filed a complaint to foreclose its lien. Paiute Oil, Sam Oil, Inc., Walker Energy, Duchesne County, and Gulf Oil Corp. were named as defendants.(R.1-6)

7. On December 18, 1985, Paiute Oil & Mining Corporation filed a voluntary reorganization petition under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the District of Utah. All actions against Paiute were stayed by the filing of that Petition.

8. On February 25, 1986, the District Court ordered that the answers of defendants Sam Oil, Inc., Walker Energy, Chevron USA, Inc. and Duchesne County be stricken and granted judgment of foreclosure of Tech-Fluid. (R.423-424). A copy of the Court's Order is attached hereto as Exhibit "A."

9. Tech-Fluid obtained an order granting relief from the automatic stay on May 18, 1987 as to Paiute Oil. (R.427) A copy of the Court's Order is attached hereto as Exhibit "B."

10. On May 20, 1987, Tech-Fluid obtained an order authorizing foreclosure and a public sale pursuant to the provisions of the Mechanic Lien Foreclosure Act. (R.426)

11. Tech-Fluid subsequently filed a notice of sheriff's sale and an execution in the amount of $86,943.64 together with interest. (R.435) The property was sold July 2, 1987 to Tech-Fluid for $4000. (R.443-444)

12. On December 31, 1987, Paiute Oil, through a director Walter Davidson, purportedly assigned Paiute Oil's

redemption rights to Wind River Resources Corporation. (R.462) A copy of the assignment is attached hereto as Exhibit "C."

13. The assignment has been purportedly acknowledged by an unidentified notary without a seal being apparent on the face of the copy. Exhibit "C" (R.462)

14. On January 1, 1988, Wind River Resources served the following Documents on an on duty dispatcher at the Duchesne County Sheriff's Office:

Exhibit "D" - Cashier's check in the sum of $4310.00

Exhibit "E" - Assignment of Rights of Redemption

Exhibit "F" - Notice of Redemption

Exhibit "G" - Sheriff's Redemption Certificate

15. On January 8, 1988, plaintiff filed a motion for order to show cause why the Sheriff should not issue a deed to Tech-Fluid based upon an invalid redemption. (R.492-53)

16. The Court issued an order to show cause to be heard on January 19, 1988 at 1:30 in Duchesne County Courthouse. (R.454-55)

17. The Court held a hearing on January 19, 1988 on plaintiff's order to show cause. Counsel for Tech-Fluid and Wind River argued the case to the Court and were given ten

days to submit briefs. (R.456)

18. The Court issued its Ruling on February 5, 1988 ruling that the assignment was valid, rights of redemption could not be executed upon and Wind River was entitled to redemption under Rule 69 because it had substantially complied with Rule 69. Finally, the Court ordered that Tech-Fluid had no further interest in the well. (R.569-570)

19. On February 10, 1988 Tech-Fluid filed a motion and accompanying memorandum of law pursuant to Rule 69(f)(3) objecting to the amount of money posted by Wind River. Tech-Fluid requested a hearing on its motion. (R.581-585)

20. On February 11, 1988 plaintiff filed a Motion to Alter or Amend the ruling (R.572-573) raising the issues of whether plaintiff's lien is extinguished and whether the Court misapplied this Court's holding in J.A. Mollerup v. Storage Systems International, 569 P.2d 1122 (Utah 1977). (R.572-80)

21. Wind River filed responses to plaintiff's motion and filed a motion for sanctions. (R.586-599)

22. Plaintiff responded to Wind River's motion for sanctions (R.600-602) and replied to Wind River's responses to plaintiff's other motions. (R.603-608) Plaintiff filed a request for ruling on all motions before the Court. (R.609-610)

23. On February 29, 1988 the Court issued its ruling denying all post hearing motions. (R.611)

24. The Court signed its Conclusions of Law and Order on February 29, 1988. (R.612-617)

25. Plaintiff filed a Notice of Appeal on March 3, 1988. (R.619-620)

26. Subsequent to filing plaintiff's Notice of Appeal, defendant Wind River Resources sold its interest to Gavilan Operating Incorporated.

SUMMARY OF ARGUMENT

The trial court erred in ruling that the rights of redemption to the oil well 13-ND-1 belonged to Paiute Oil on December 31, 1987. Paiute had been in bankruptcy since September 1984 and the redemption rights were an assets of its bankruptcy estate pursuant to 11 U.S.C. 541(a)(1) and (7). Redemption rights are interests in property which pass to the trustee in bankruptcy. Paiute Oil did not own the rights when they sold them to Wind River on December 31, 1987 and the trustee as owner of the rights never sold or abandoned the rights. As such Wind River Resource's redemption is invalid.

Wind River's redemption is also void for failure to comply with the mandatory requirements Utah Rules of Civil

Procedure Rule 69 governing redemptions. Specifically, Wind River failed to file a certified copy of the order granting foreclosure and execution; failed to provide a properly acknowledged assignment of rights; and failed to file an affidavit showing the amount due on the lien. The deficiencies render the redemption void for failure to adhere to the minimal procedural requirements of Rule 69(f), Utah Rules of Civil Procedure.

The trial court erred when it held that Wind River substantially complied with the provisions of Rule 69. "Substantial compliance" is not a basis for the court granting relief to Wind River absent some reason for the court to proceed in equity. This Court's decision in J.A. Mollerup v. Storage Systems International, 569 P.2d 1122 (Utah 1977), mandates strict compliance with Rule 69. This Court's decision in United States v. Loosley, 551 P.d 506 (Utah 1976) is inapplicable to the facts of this case because Tech-Fluid engaged in no inequitable conduct justifying equitable relief. Because Wind River failed to comply with Rule 69, the redemption is void.

Wind River also failed to post the proper amount of money for redemption. In order to redeem, Wind River must

post the entire amount due on the lien with interest. Rule 69(f)(3) provides for payment of the entire lien in order to redeem under a lien foreclosure. In the alternative, if Wind River need only post the amount of the sale, then Tech-Fluid's lien is still in tact and Tech-Fluid may once again foreclose its lien. Redemption only stopped the sale and restored the debtor to its property as if there had been no sale. The property is therefore encumbered by the lien.

ARGUMENT

POINT I

THE RIGHT OF REDEMPTION IS A SEPARATE ASSET OF THE BANKRUPTCY ESTATE THAT HAD NOT BEEN ABANDONED OR SOLD BY THE BANKRUPTCY TRUSTEE AND THEREFORE DID NOT BELONG TO PAIUTE OIL ON DECEMBER 31, 1987.

Paiute Oil filed for Bankruptcy on December 18, 1985, and the case is still pending. Paiute Oil was therefore still under the protection of the provisions of the Bankruptcy Code throughout the entire redemption period of July 21, 1987 to January 2, 1988. On December 31, 1987, Paiute assigned its redemption rights to Wind River Resources without the knowledge or consent of the Bankruptcy Trustee or the Bankruptcy Court and without notice and opportunity to bid on the rights by any creditor. The first issue presented is

whether Paiute Oil or the Bankruptcy estate owned the rights of redemption.

Tech-Fluid had filed its lien foreclosure action against the Paiute oil Well 13-1 prior to Paiute's filing bankruptcy. When Paiute filed for Bankruptcy, 11 U.S.C. 362 stayed all further action against Paiute by Tech-Fluid and all other creditors. The first sub-issue is whether the redemption rights became property of the estate at the time of filing.

The relevant part of 11 U.S.C. §541(a) provides:

> (a) The commencement of a case under Section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property wherever located and by whomever held:
>
> (1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case
>
> . . .
>
> (7) Any interest in property that the estate acquires after the commencement of the case.

The broad language of §541(a)(1) encompasses all legal and equitable interests owned by the debtor at the time of filing the petition. Numerous courts have held that a mortgagor's redemption rights is an asset of the estate over

which the Bankruptcy Court has jurisdiction. See In re Smith, 43 B.R. 313, 11 C.B.C.2d 1057 (BC ND Ill. 1984); Ravenswood v. Patzhold, 27 B.R. 542 (BC ND Ill. 1982); In Re Markee, 31 B.R. 429, 8 C.B.C.2d 1331 (BC DC Idaho 1983). Indeed, most courts which have looked at the issues of who may sell the redemption rights, including the Bankruptcy Court for the District of Utah, have specifically held that the debtors equity of redemption with its rights to exercise, sell or transfer these rights pass to and can only be exercised by the trustee in Bankruptcy. See In re Patio Springs, Inc., 6 B.R.W. 428, 431 (B.C.D. Utah 1980) (construing Utah law); In re Thomas J. Grosso Investment, Inc. 457 F.2d 168 (9th Cir. 1972) (construing Arizona law); In re Bank of the Commonwealth, 6 C.B.C. 699 (E.D. Mich. 1981) (construing Michigan law).

The Patio Springs the Bankruptcy Court stated as a matter of law that the debtor's right of redemption passes to the bankruptcy trustee when the debtor is in bankruptcy. The debtor in Patio Springs filed a petition for relief under Chapter 11 of the Bankruptcy Act. The debtor owned property in Weber County encumbered by a first mortgage by First Security Bank. Id. at 6 B.R. 428. Pursuant to the orders of the Bankruptcy Court, the stay against First Security Bank was

vacated and the bank was allowed to foreclose on October 18, 1979. On April 27, 1980, one day prior to expiration of the six month statutory period of redemption, the Court adjudicated the debtor bankrupt and appointed a trustee. The trustee subsequently made application to the Court to sell the bankrupt's right of redemption. Id. Although the issue was whether 11(e) of the Bankruptcy Act extended the redemption period for 60 days, the Court quite clearly recognized that the debtor's right of redemption belongs to the trustee if the debtor is in bankruptcy proceedings.

As the Court stated:

> It is, first of all, essential to note that the equity of redemption, and its concomitant rights to exercise or transfer such, are property rights of the debtor which the trustee succeeds. See Local Realty Co. v. Lindquist, 96 Utah 297, 85 P.2d 770, 775 (1938)

Patio Springs at 6 BRW 431.

Thus, the Bankruptcy Court for the District of Utah construing Utah's Redemption Statute has held that the right of redemption belonged to the trustee in Bankruptcy. This opinion is in accord with the Court's decision in Layton v. Layton, 140 P.2d 759 (Utah 1943).

The Layton Court recognizes that the rights of

redemption owned by the debtor pass to the Bankruptcy estate. As the Court stated:

> It is evident, therefore, that the only right or interest in this property which became subject to the exclusive jurisdiction of the bankruptcy court was the right of redemption.

Id. at 761.

In another part of the opinion the Court stated:

> I am also clearly of the view that the foreclosure sales and the issuance of the sheriff's certificates thereunder operated to extinguish all of the mortgagor's property in and to the real estate involved, save only the bare legal title, coupled with the statutory right of possession and the right of redemption within the time allowed by statute. These are valuable property rights, and the bankruptcy court undoubtedly has jurisdiction over them.
> . .

Id. at 763. (Emphasis added)

In this case, however, a trial Court ruled that the trustee abandoned the redemption rights when she abandoned the well pursuant to the Bankruptcy Court's order. There are three separate reasons why this ruling is erroneous as a matter of law.

A. The asset of the debtor's right of redemption is a personal right of the debtor and does not constitute any interest in the well itself.

The right of redemption was created by statute which is silent as to the exact nature of the right. The statutory

language has remained essentially unchanged since the 10th Circuit discussed the nature of the redemption right in Layton v. Thayne. 133 F.2d 287 (10th Cir. 1943), a bankruptcy case construing Utah's redemption law. Layton involved a case where the plaintiff formerly owned a farm in Utah. In December 1936 he gave the Davis County Bank a mortgage on his farm. Thereafter in the same month he executed a second mortgage to the Rural Rehabitation Corp. which transferred the mortgage to Thayne. On February 1, 1937, Thayne instituted foreclosure proceedings on Layton's second mortgage, subject to the first mortgage. On February 15 Layton deeded the farm to his wife. The Thayne mortgage foreclosure proceeded to judgment and sale. Layton made no attempt to redeem within the statutory period and the sheriff issued and delivered a deed to Thayne. Id. at 288.

The first mortgagor then instituted a foreclosure action which also proceeded to judgment and sale. At the sale the bank purchased the property for less than the amount of its claim and Layton became a judgment debtor. The bank had Layton physically removed from the property by writ two days after the sale.

Shortly before the expiration of the period of redemption under the bank's foreclosure proceedings, Layton filed an amended petition in Bankruptcy and was adjudicated bankrupt. Layton then asserted that he had a right of possession of his farm during the redemption period pursuant to the provisions of the Bankruptcy Act governing agricultural composition or extension proceedings. The creditors sought to strike the farm from his schedule due to the fact that the Thayne foreclosure divested Layton of all his interest in the property.

The Court ruled that the right of redemption was a personal right under Utah law and not a right in the land itself which would have entitled Layton to immediate possession of the farm or the fruits thereof. Id. at 289-290. As the Court stated:

> It is concede that under the laws of Utah appellant has a right of redemption. This right of redemption is within the protective provisions of the act . . . but it does not follow that, because a distressed farmer has a right of redemption, he is entitled to the possession thereof, together with income therefrom, in a farmer debtor proceeding.

In reasoning why the right of redemption does not grant Layton a right of possession in the land the Court

stated:

> It (statutory right of redemption) is a mere personal privilege rather than an interest or estate in land. It maybe exercised only by those persons named in the statute . . . (citation omitted) and only by them after foreclosure. It does not constitute any interest or estate in the real estate itself.

Layton v. Thayne, 133 F.2d at 289. (Emphasis added)

The right of redemption is therefore an asset that does not go with the land. As such, it was not abandoned by the trustee when she abandoned the well and remained property of the estate as does any other personal right of the debtor.

There are strong policy reasons for holding that a right of redemption remains the property of the bankruptcy estate even though the underlying property is abandoned by the trustee. The purpose behind the bankruptcy stay is to grant the debtor breathing space to allow an orderly marshalling of the debtors assets for sale and distribution to creditors in an orderly and equitable manner.

The definition contained in 11 U.S.C. §541(a) is as broad as possible so as to include all the debtor's legal and equitable interests. Courts have held that this definition encompasses the following causes of action: personal injury, Tignor v. Parkinson, 729 F.2d 977 (CA 4th Cir 1984); business

torts, Moore v. Slonim, 426 F.Supp. 524 (DC Com 1977); property damage, In re Winters, 424 F.Supp. 1389 (ED Mo. 1975); and breach of contract actions - In re J. Robert Pierson, Inc. 44 BR 556 (ED Pa 1984).

In re Taylor, 21 B.R. 179, 180 (B.C. W.D. Mo 1982), the Court determined that under Missouri law a right of redemption is a cause of action of the debtor to which the trustee in bankruptcy succeeds upon filing of a petition.

These cases clearly indicate that the policy behind bankruptcy is to use whatever nonexempt interest in property the debtor may own to satisfy the claims of creditors. Right of redemption are assets that should be administered by the trustee to satisfy the claims of creditors.

This conclusion is supported by Bankruptcy Rule 6008 which provides:

> On motion by the debtor, trustee or debtor in possession and after hearing an notice as the Court may direct, the Court may authorize the *redemption of property from a lien or from a* sale to enforce a lien in accordance with applicable law.

Rule 6008 clearly indicates that rights of redemption are property of the estate to be exercised only after approval of the court with notice to the secured creditor. Thus

although the trustee abandoned "the bankrupts interest in the well" it did not abandon the right of redemption and the right of redemption remained property of the estate.

B. The redemption rights were not listed as an asset of the debtor and therefore could not be abandoned by the trustee pursuant to 11 U.S.C. 554.

Assets of the Bankruptcy estate may be abandoned only pursuant to 11 U.S.C. 554 because of the code's twin policies of mandating court approval for abandonment and administering the estate for the benefit of all creditors. See, In re Auto West, Inc., 43 B.R. 761 (DC Utah 1984). 11 U.S.C. §554 provides that after notice and hearing, the trustee may abandon property of the estate that is of inconsequential value and benefit to the estate.

The record is clear that the trustee never abandoned the redemption rights per se. Gavilon appears to argue that the rights went with abandonment of the well. This argument avoids the rule of law that all the debtors property remains in the estate until the property is administered or abandoned. 11 U.S.C. 554(d). The party asserting that property of the bankruptcy estate has been abandoned has the burden of proving abandonment. Riverside Memorial Mausoleum,

Inc. v. Urret, 469 F.Supp 643 (ED Pa 1979).

In this case the rights of redemption were not listed as an abandoned asset and therefore could only be sold by the trustee. This fact was implicitly recognized by Paiute Oil when it turned over the proceeds from the assignment to the trustee in bankruptcy on January 11, 1988. Wind River and its successor in interest therefore have failed to establish abandonment of the redemption rights to the debtor.

C. In the alternative, the rights of redemption became an after acquired asset of the bankruptcy estate.

Section 541(a)(7) was a new addition to the 1978 Bankruptcy Code which has no counterpart in the old Bankruptcy Act.

> The Legislative history of Section 541(a)(7) is new. The provision clarifies that any interest in property that the estate acquires after the commencement of the case is property of the estate. For example, if the estate enters into a contract, after commencement of the case, such a contract would be property of the estate. The addition of this provision of House amendment merely clarifies that §541(a) is an all embracing definition which includes charges on property such as liens held by the debtor on property of a third party, or the beneficial rights and interest that the debtor may have in the property of another. . . .

In re Savary, 57 B.R. 298 (CH Bankr.L.Rptr. 70969. BC MD Fla 1986) is illustrative of Tech-Fluid's claim. Savary involved a debtor's tractor loader which had been repleved prepetition and sold post petition in violation of the automatic stay. After awarding $10,000 in damages against the creditor, the court held an adversary proceeding to determine whether the debtor or the trustee was entitled to damages. The Court held that since the sale had not taken place at the time of filing, legal title remained in the debtor and became property of the estate. Accordingly, when it was converted, the party injured was the debtor's estate, not the debtor individually, and damages belonged to the estate pursuant to 541(a)(7). Id. at 57 B.R. 298-300.

In this case the redemption rights existed due to the debtor's legal title in the well which passed to the trustee upon filing. In its order, the trustee abandoned "the bankrupts interest in the well." The trustee did not abandon all of the estate's interest in the well. Accordingly, when the foreclosure sale occurred on July 2, 1987, the redemption right inurred to the benefit of the estate and became an after acquired asset of the bankruptcy estate pursuant to 541(a)(7). The bankruptcy estate therefore owned the rights

of redemption throughout the period of redemption. Wind River acquired nothing by way of its assignment of redemption rights because Paiute Oil never owned the rights.

POINT II

IN THE EVENT PAIUTE OIL OWNED THE RIGHT OF REDEMPTION, TECH-FLUID EXECUTED UPON THE ASSET PRIOR TO ASSIGNMENT.

Generally, every kind of property or interest therein, not otherwise exempt by statute, may be reached by an execution issued on a judgment. C.J.S. Executions §18 p.152. As noted, rights of redemption are not expressly exempted by statute. Furthermore, Utah cases treat rights of redemption as property interests in that they are completely transferable. See Carlquist v. Coltharp, 348 P. 481 (Utah 1926); Corey v. Roberts, 25 P.2d 940 (Utah 1933); Bennion v. Amoss, 530 P.2d 810 (Utah 1975).

The Utah Supreme Court has discussed the nature of this asset in several cases. In Mollerup v. Storage Systems International, 569 P.2d 1122 (Utah 1977), the lower court had extended the period of redemption beyond that established by statute. To this, the Supreme Court admonished the lower court by stating:

> . . . that no tender was ever made since the bankrupt estate was and is entirely without assets and that the only prospect of an "asset"

> is the value, if any, of the right of redemption for which he is hopeful of finding a purchaser. Id. at 1124.

Accordingly, although the statute does not expressly term a right of redemption a property interest, Utah cases consistently treat it as though it has property characteristics in that it has value and is transferable and as such should be subject to execution.

Additional support for permitting execution on rights of redemption is found in Evans v. Humphrey, 5 P.2d 545 (Idaho 1931). In Evans, the Idaho Court acknowledged a split of jurisdictions on the subject but nonetheless found that a judgment debtor's equitable right of redemption, after execution sale was subject to levy and sale under subsequent executions. Id. at 547. Idaho's redemption statute is similar to that of Utah's redemption statute. This position has been affirmed in a recent Idaho case as well. See Suchan v. Suchan, 741 P.2d 1289 (Idaho 1986).

POINT III

WIND RIVER RESOURCES' REDEMPTION WAS INVALID FOR FAILURE TO COMPLY WITH THE REQUIREMENTS OF RULE 69(f), U.R.C.P.

Utah Rules of Civil Procedure, Rule 69(f) governs the procedural requirements for a valid redemption. Rule 69(f)(2)

provides:

> At the time of redemption the person seeking the same may make payment of the amount required to the person from whom the property is being redeemed, or for him to the officer who made the sale or his successor in office. At the same time the redemptioner must produce to the officer or person from whom he seeks to redeem, and serve with his notice to the officer:

(Emphasis added)

> . . .
>
> (1) a certified copy of the docket of the judgment under which he claims the right to redeem;
>
> (2) an assignment, properly acknowledged or proved where the same is necessary to establish his claim;
>
> (3) an affidavit by himself or his agent showing the amount due on the lien.

When Wind River filed for redemption is served upon a dispatcher at the Duchesne County Sheriff's Office the following documents:

1) A copy of an Assignment of Rights (Exhibit E);

2) A Notice of Redemption (Exhibit F);

3) Sheriff's Certificate of Redemption (Exhibit G); and

4) A cashier's check in the sum of $4310.00 (Exhibit D).

Wind River filed no other documents.

Wind River failed to file a certified copy of the order of foreclosure. Moreover, the original Document evidencing the assignment does not supply a recognizable notary seal or signature. Finally, Wind River failed to file an affidavit showing the amount due on the lien.

The trial Court nonetheless ruled that Wind River substantially complied with Rule 69 and authorized redemption.

The trial court erred in authorizing redemption because substantial compliance is not the standard this Court stated is the law regarding compliance with Rule 69. In Mollerup v. Storage Systems International, 569 P.2d 1122 (Utah 1977), this Court held that a redemptor must strictly comply with the requirements of statute.

In Mollerup, the trial court extended the period of redemption beyond the six month period of redemption pursuant to two ex parte orders submitted by the redemptor under Rule 6, Utah Rules of Civil Procedure. Reversing, the Court held:

> The right of redemption has long been recognized as a substantive right to be exercised in strict accord with statutory terms. It is not an equitable right cured or regulated by principles of equity but, rather, is a creature of statute and depends entirely upon the provisions of the statute creating the right.

Id. 569 P.2d at 1124 (Emphasis added)

Wind River's efforts to redeem clearly do not constitute strict compliance with the terms of the statute as mandated by this Court's decision in Mollerup.

The Court found that substantial compliance with Rule 69 is sufficient to establish a valid redemption. Assuming arguendo that the documents filed constitute substantial compliance, the redemption still is invalid under Mollerup because they were not in strict compliance with statute. Wind River however cited this Court's decision in United States v. Loosley, 551 P.2d 506 (Utah 1976) for support that substantial compliance is sufficient to justify redemption.

Loosley involved the same deficiencies as in this case with the exception that in this case Tech-Fluid is also challenging the validity of the assignment. The chief difference between this case and Loosley's is that the creditor-purchaser knew of the deficiencies in Loosley and failed to notify the redemptor. The Court sitting in equity held that the deficiencies were insufficient to defeat the redemption because the creditor- purchaser knew 24 hours prior to the expiration of the redemption period of the redemptor's technical deficiencies in the redemption. The creditor failed to inform the redemptors even after a phone call by the

redemptor asking if there were any deficiencies in the redemption. Id. at 507. Under the facts of Loosley, the Court held that the trial court, sitting in equity, could grant the redemption despite the deficiencies due to the misconduct and waiver on the part of the creditor-mortgagee. Id. at 508.

The facts of this case are clearly distinguishable from Loosley in that Tech-Fluid had no knowledge of the redemption until after the period to redeem had expired. This Court's decision in Mollerup specifically limits Loosley to instances where a court sitting in equity may grant relief for "fraud, accident, mistake or waiver as was found to exist in United States v. Loosley, Utah, 551 P.2d 506 (1976)." Mollerup, 569 P.2d at 1124. There are simply no facts in this case to move the conscience of the court to grant Wind River relief in equity as there was no fraud, accident, mistake or waiver on the part of Tech-Fluid. Mollerup mandates that Wind River's redemption be denied for failure to comply with Rule 69(f). To allow redemption under these facts will render the requirements of Rule 69 advisory.

Moreover, absent inequitable conduct on the part of the creditor, substantial compliance is a bad rule and may

lead to further litigation over what constitutes substantial compliance. This Court has frowned upon substantial compliance in recent cases construing the notice requirements of Utah's lien statute. In Graff v. Boise Cascade Corp., 660 P.2d 721 (Utah 1983), the lien claimant filed a notice of lien that failed to contain the name of the person to whom the material was furnished and the notice lacked proper verification. This Court held the lien invalid refusing to apply the doctrine of substantial compliance to the facts of that case. Id. at 722-723. See also, First Security Mortgage Co. v. Hansen, 631 P.2d 919 (Utah 1981) (where this Court rejected plaintiff's substantial compliance argument and held that proper verification of the lien notice was a mandatory condition precedent to creation of a valid lien).

Although substantial compliance has its place in the law to prevent creditors from engaging in inequitable conduct, it simply does not apply to the facts of this case. This Court should reverse the decision of the trial court and remand for a decision denying redemption for failure to comply with Rule 69, Utah Rules of Civil Procedure.

POINT IV

WIND RIVER'S REDEMPTION IS INVALID FOR FAILURE TO POST THE PROPER AMOUNT FOR REDEMPTION, WHICH IS THE FULL VALUE OF TECH-FLUID'S LIEN.

As previously indicated, Tech-Fluid bid $4000 at the sale. Wind River Resources posted $4310.00 as redemption on the well. This is not the proper amount in order to redeem pursuant to Rule 69(f)(3). Wind River must post the amount of the lien with interest.

Rule 69(f)(3), Utah Rules of Civil Procedure, provides:

> The property may be redeemed from the purchaser within six months after the sale on paying the amount of his purchase with 6 percent thereon . . . and, if the purchaser is also a creditor having a lien prior to that of the person seeking redemption, other than the judgment under which sad purchaser was made, the amount of such lien with interest. (Emphasis added)

"Purchaser" means Tech-Fluid. In order to properly redeem, Wind River needed to post the amount of the lien with interest.

At trial, Wind River argued that the underlined provision only applies to other lienholders or creditors seeking to redeem and not an assignee of the judgment debtor who need only post the sale price to satisfy the debt and extinguish the lien. This conclusion is flawed because it

fails to recognize the specific language in Rule 69(f)(5) which provides: "If the judgment debtor redeems he must make the same payments as are required to effect redemption by a creditor."

Other courts looking at the issue have specifically held that the entire amount of the debt must be paid in order to redeem, not just the sale price. The seminal case is Collins v. Riggs, 81 U.S. 491, 20 L.Ed.2d 723 (1872), wherein the Court held:

> To redeem property which has been sold under a mortgage for less than the mortgage debt, it is not sufficient to tender the amount of the sale. The whole mortgage debt must be tendered or paid into court. The party offering to redeem, proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed it is still in existence. Therefore he can only lift it by paying it. The money will be subject to distribution between the mortgagee and the purchaser, in equitable proportions, so as to reimburse the latter his purchase money and pay the former the balance of this debt.

Id. at 81 U.S. at 498, 20 L.Ed.2d at 724.

Numerous courts have adopted the Collins rule regarding the amount necessary for redemption. Sun First National Bank of Orlando v. R.G.G., 348 So.2d 621 (Fla App. 1977); United States v. Brosnan, 264 F.2d 762, 766 (3rd Cir. 1959); Garuich v. Associates Financial Services Co., 435 So.2d

30 (Ala 1983) (when mortgagee buys at foreclosure sale the amount of the debt is treated as the purchase price rather than the amount bid.)

This rule was codified in 28 U.S.C. 2410(d)(1) which requires the United States to post the amount of the debt, not just the sale price, if it wants to redeem property sold under a lien.

Policy reasons support this court adopting the Collins rule. The creditor takes security for payment of the debt. Before the debtor should be entitled to redeem the property free and clear of the creditors lien, the underlying debt should be paid in full. All parties would obtain exactly what they were entitled to under their contractual rights and the debtors property rights are protected.

The alternative would be to allow the debtor to redeem by paying the sale bid price but not extinguish the lien. This rule, although more cumbersome, appears to be the current rule of law regarding redemption. In Bennion v. Amoss, 530 P.2d 810 (Utah 1975), this Court held that a redemption by the assignee of the judgment debtor "restores the property to the same condition as if no sale had been attempted." Id. at 812. Rule 69(f)(5) provides "if the debtor redeems, the

effect of the sale is terminated and he is restored to his estate.

Thus a redemption terminates the effect of the sale leaving the property still encumbered by the Tech-Fluid lien. Tech-Fluid can at any time notice up a new sale to obtain payment of its lien. Wind River argued the Tech-Fluid lien was extinguished by the sale. The above quoted language however shows that it was restored by redemption "as if no sale had taken place." The better rule of law would require the debtor to post the entire amount of the lien in order to redeem and Tech-Fluid urges this Court to adopt that interpretation of Rule 69.

CONCLUSION

Tech-Fluid respectfully requests that this Court reverse the judgment of the trial court and remand with instructions to issue the Sheriff's Deed to Tech-Fluid.

Respectfully submitted this 21st day of July, 1988.

McRAE & DeLAND

HARRY H. SOUVALL
Attorney for Appellant

CERTIFICATE OF DELIVERY

I do hereby certify that I caused to be hand-delivered four (4) true and correct copies of the foregoing Brief of Appellant to Clark B. Allred, Attorney for Respondent, 363 East Main Street, Vernal, Utah 84078 on this 21st day of July, 1988.

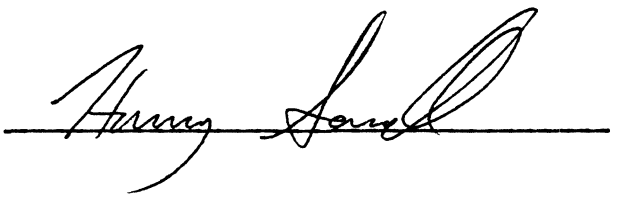

Exhibit A

ROBERT M. McRAE, #2217
McRAE & DeLAND
Attorneys for Plaintiff
209 East 100 North
Vernal, UT 84078
(801) 789-1666

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

STATE OF UTAH

TECH-FLUID SERIVCES, INC.,

Plaintiff,

vs.

PAIUTE OIL & MINING CORP., SAM OIL, INC., WALKER ENERGY GROUP, CHEVRON U.S.A. INC., and DUCHESNE COUNTY, a body politic,

Defendants.

O R D E R

Civil No. 85-CV-13D

This Court, having heretofore entered it's Order February 10, 1986, that defendants Sam Oil, Inc., Walker Energy Group, Chevron U.S.A., Inc. and Duchesne County, a body politic, within 10 days file proof with this Court of any evidence of ownership in that certain oil well and appurtenances thereto known as 13ND-1 and no proof of ownership having been filed therein by any of these defendants, IT IS ORDERED that their answers be stricken and that a judgment of foreclosure issue in favor of plaintiff as against said oil well.

FILED
7th DISTRICT COURT DUCHESNE
STATE OF UTAH
FEB 25 1986
ROGER K. MARETT, Clerk

0425

This Court, having been advised that defendant Paiute Oil & Mining Corp. is under the jurisdiction of the United States Bankruptcy Court, District of Utah, plaintiff's rights as between this defendant will not be adjudicated at this time.

DATED this 25 day of February, 1986.

BY THE COURT:

RICHARD C. DAVINDSON
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a copy of the foregoing to the following on this 25 day of February, 1986.

Mr. Kent H. Murdock
Attorney for Defendant Chevron
P.O. Box 45385
Salt Lake City, UT 84145-0385

Dennis L. Draney
Attorney for Duchesne County
P.O. Box 206
Duchesne, UT 84021

Brent V. Manning
Attorney for Walker
50 South Main Street, #900
Salt Lake City, UT 84114

Paul N. Cotro-Manes
Attorney for Paiute
311 South State, #280
Salt Lake City, UT 84111

Mr. Roland F. Uresk
Attorney for Sam Oil
156 North 200 East
Roosevelt, UT 84066

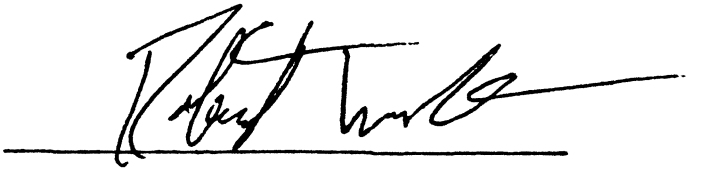

Exhibit B

ROBERT M. McRAE, #2217
McRAE & DeLAND
Attorneys for Plaintiff
209 East 100 North
Vernal, Utah 84078
Telephone: 789-1666

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

STATE OF UTAH

TECH-FLUID SERVICES, INC., Plaintiff,	:	O R D E R
vs.	:	
PAIUTE OIL & MINING CORP., SAM OIL, INC., WALKER ENERGY GROUP, CHEVRON U.S.A. INC., and DUCHESNE COUNTY, a body politic, Defendants.	:	Civil No. 85-CV-13D

A certified copy of the Release of Automatic Stay provisions of the U. S. Bankruptcy Act having been filed with this Order releasing the automatic stay provision as it may apply to Paiute Oil & Mining Corp., IT IS HEREBY ORDERED that the Sheriff of Duchesne County post and conduct a public sale as provided for by law in the Mechanic Lien Foreclosure Act.

DATED this 20th day of May, 1987.

BY THE COURT:

Dennis L. Draney
DENNIS L. DRANEY
District Court Judge

FILED
th DISTRICT COURT DUCHESN
STATE OF UTAH
JUN 9 1987
ROGER K. MAHETI, Clerk
MBP, Deputy

0426

L. A. DEVER, #0875
McRAE & DeLAND
Attorneys for Tech-Fluid
209 East 100 North
Vernal, Utah 84078
Telephone: 789-1666

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re:	:	
PAIUTE OIL AND MINING CORPORATION,	:	Bankruptcy No. 84C-02620
	:	(Chapter 7)
Debtor.	:	

ORDER GRANTING RELIEF FROM AUTOMATIC STAY

AND ABANDONMENT

The motion of Tech-Fluids for relief from automatic stay came before the Court; and no objections having been filed to the motions; and after filing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the automatic stay of Section 362(a) of the Bankruptcy Code is terminated as to Tech-Fluids, effective upon entry of this Order. The trustee is ordered to abandon the bankrupt's interest in Well ND13-1.

DATED this 16 day May, 1987.

BY THE COURT:

GLEN E. CLARK
Bankruptcy Court Judge

Rule 5003(c) Designation
Clerk is directed to enter a copy of this Order into the Court's Order Book.
Entry into Order Book not necessary.

I hereby certify that the annexed and foregoing is a true and complete copy of a document on file in the United States Bankruptcy Court for the District of Utah.
Dated: MAY 18 1987
Attest:

0427

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a copy of the Order in the Seventh Judicial District Court and a copy of the Certified Order Granting Relief From Automatic Stay and Abandonment to the following on this 2nd day of June, 1987.

Ms. Harriet E. Styler
8 East Broadway, Suite 201
Salt Lake City, UT 84111

Mr. Richard Johns
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, UT 84101

ROBERT M. McRAE

EXHIBIT C

ASSIGNMENT OF REDEMPTION RIGHTS

Paiute Oil & Mining Corporation, a Utah corporation, hereby assigns and conveys, without warranty, to Wind River Resources Corporation, a Utah corporation, all of Paiute's right, title and interest in the property described below, plus all of Paiute's right to redeem said property from the sale held on July 2, 1987 pursuant to an execution issued in the case of Tech-Fluid Services, Inc. vs. Paiute Oil & Mining Corp., Civil No. 85-CV-13D in the Seventh Judicial District Court of Duchesne County, State of Utah. Wind River Resources Corporation is hereby authorized to take any and all actions necessary to redeem said property on its own behalf in the stead of Paiute Oil & Mining Corporation.

The property to be redeemed is described as follows:

> All operating and leasehold interest in the Paiute-Walker #13-ND-1 Well located at 820 FNL 932 FEL Section 13, Township 3 South, Range 5 West USM, Duchesne County, Utah, together with all rights, privileges, franchise, easements, equipment, machinery or appliances appurtenant thereto.

EXECUTED the 31st day of December, 1987.

PAIUTE OIL & MINING CORPORATION

By: Walter McDavidson
Director

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the 1st day of January, 1988, personally appeared before me, WALTER DAVIDSON who, being by me duly sworn, did say, that he is ~~the~~ A DIRECTOR of Paiute Oil & Mining Corporation, and that this instrument was signed in behalf of said corporation by authority of its bylaws, and said WALTER DAVIDSON acknowledged to me that said corporation executed the same.

Notary Public
Residing at: Roosevelt Utah

My Commission Expires:
10/6/89

Exhibit D

ity First Security Bank of Utah, N.A.
Salt Lake City, Utah

Official Check

50-1042
223

848452921

Office No. 052 1a Date 12/31/87

DUCHESNE COUNTY SHERIFF $ **4,310.00**

FIRST SECURITY BANK OF UTAH, N.A. 8431ambdacs

ION 13-ND-1 WELL

ate). N.A.: Authorized Signature by: Colleen White
Drawer First Security Bank of Utah

⑆022310422⑆ 8⑈467567 848452921

ASSIGNMENT OF REDEMPTION RIGHTS

Paiute Oil & Mining Corporation, a Utah corporation, hereby assigns and conveys, without warranty, to Wind River Resources Corporation, a Utah corporation, all of Paiute's right, title and interest in the property described below, plus all of Paiute's right to redeem said property from the sale held on July 2, 1987 pursuant to an execution issued in the case of Tech-Fluid Services, Inc. vs. Paiute Oil & Mining Corp., Civil No. 85-CV-13D in the Seventh Judicial District Court of Duchesne County, State of Utah. Wind River Resources Corporation is hereby authorized to take any and all actions necessary to redeem said property on its own behalf in the stead of Paiute Oil & Mining Corporation.

The property to be redeemed is described as follows:

> All operating and leasehold interest in the Paiute-Walker #13-ND-1 Well located at 820 FNL 932 FEL Section 13, Township 3 South, Range 5 West, USM, Duchesne County, Utah, together with all rights, privileges, franchise, easements, equipment, machinery or appliances appurtenant thereto.

EXECUTED the 31st day of December, 1987.

PAIUTE OIL & MINING CORPORATION

By: Walter H. Davidson
Director

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the 1st day of January, 1988, personally appeared before me, WALTER DAVIDSON who, being by me duly sworn, did say, that he is ~~the~~ A DIRECTOR of Paiute Oil & Mining Corporation, and that this instrument was signed in behalf of said corporation by authority of its bylaws, and said WALTER DAVIDSON acknowledged to me that said corporation executed the same.

Notary Public
Residing at: Roosevelt, Utah

My Commission Expires:
10/6/89

Exhibit F

NOTICE OF REDEMPTION

TO: The Sheriff of Duchesne County, State of Utah.

PLEASE TAKE NOTICE that on this date, Wind River Resources Corporation, a Utah corporation, redeemed the following property from your sale thereof to Tech-Fluid Services, Inc. on July 2, 1987 pursuant to an execution on a judgment rendered in the case of Tech-Fluid Services, Inc. vs. Paiute Oil & Mining Corp., et al, Civil Case No. 85-CV-13D in the Seventh Judicial District Court of Duchesne County, State of Utah. The certificate of sale shows a purchase price of $4,000. This amount plus interest of $240 and posting costs of $70, for a total of $4,310 is hereby tendered to you in accordance with Rule 69(f)(2) of the Utah Rules of Civil Procedure.

The property redeemed is described as follows:

> All operating and leasehold interest in the Paiute-Walker #13-ND-1 Well located at 820 FNL 932 FEL Section 13, Township 3 South, Range 5 West, USM Duchesne County, Utah, together with all rights, privileges, franchise, easements, equipment, machinery or appliances appurtenant thereto.

Wind River Resources Corporation claims the right to redeem the above property on the basis that it has received an assignment from the judgment debtor of the judgment debtor's redemption rights so that Wind River Resources Corporation is the successor in interest of the judgment debtor for purposes of redemption in accordance with Rule 69(f)(1) of the Utah Rules of Civil Procedure. Attached hereto and incorporated by reference is an assignment of said redemption rights from the judgment debtor.

IN WITNESS WHEREOF, this Notice is executed on January 1, 1988.

WIND RIVER RESOURCES CORPORATION

By: [signature] President

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the 1 day of January, 1988, personally appeared before me THOMAS BACHTELL, who, being by me duly sworn, did say, that he is the PRESIDENT of Wind River Resources Corporation, and that the attached Notice of Redemption was signed in behalf of said corporation by authority of its bylaws, and said THOMAS BACHTELL acknowledged to me that said corporation executed the same.

Notary Public
Residing at: PARK CITY UTAH

My Commission Expires:
10/6/89

EXHIBIT G

SHERIFF'S REDEMPTION CERTIFICATE

The undersigned, acting on behalf of the Sheriff of Duchesne County, Utah, hereby certifies that on this date I received from Wind River Resources Corporation, a Utah corporation, the sum of $4,310 in full redemption of the tract of land and the property described below, from the sale thereof by the Sheriff of Duchesne County, Utah to Tech-Fluid Services, Inc. on July 2, 1987 pursuant to an execution issued on a judgment in Civil Case No. 85-CV-13D in the Seventh Judicial District Court of Duchesne County, State of Utah.

The property redeemed is described as follows:

> All operating and leasehold interest in the Paiute-Walker #13-ND-1 Well located at 820 FNL 932 FEL Section 13, Township 3 South, Range 5 West, USM, Duchesne County, Utah, together with all rights, privileges, franchise, easements, equipment, machinery or appliances appurtenant thereto.

As support for and proof of its right to redeem, the redemptioner produced an assignment of redemption rights from the judgment debtor, Paiute Oil & Mining Corporation.

IN WITNESS WHEREOF, I have executed this Certificate at Duchesne, Utah on Jan 1, 1988.

Kathleen Harrison Deputy Sheriff

STATE OF UTAH)
: ss.
COUNTY OF DUCHESNE)

On the 1 day of January, 1988, personally appeared before me KATHLEEN HARRISON the signer of the above instrument, who duly acknowledged to me that he executed the same.

Notary Public
Residing at: VERNAL, UTAH

My Commission Expires:
10/6/89

In any particular case, especially a reorganization case, the determination of which entity should be entitled to the difference between the going concern value and the liquidation value must be based on equitable considerations arising from the facts of the case. Finally, the determination of value is binding only for the purposes of the specific hearing and is not to have a res judicata effect.

The first method of adequate protection outlined is the making of cash payments to compensate for the expected decrease in value of the opposing entity's interest. This provision is derived from *In re Bermec Corporation,* 445 F.2d 367 (2d Cir. 1971), though in that case it is not clear whether the payments offered were adequate to compensate the secured creditors for their loss. The use of periodic payments may be appropriate where, for example, the property in question is depreciating at a relatively fixed rate. The periodic payments would be to compensate for the depreciation and might, but need not necessarily, be in the same amount as payments due on the secured obligation.

The second method is the fixing of an additional or replacement lien on other property of the debtor to the extent of the decrease in value or actual consumption of the property involved. The purpose of this method is to provide the protected entity with an alternative means of realizing the value of the original property, if it should decline during the case, by granting an interest in additional property from whose value the entity may realize its loss. This is consistent with the view expressed in *Wright v. Union Central Life Ins. Co.,* 311 U.S. 273 (1940), where the Court suggested that it was the value of the secured creditor's collateral, and not necessarily his rights in specific collateral, that was entitled to protection.

The section makes no provision for the granting of an administrative priority as a method of providing adequate protection to an entity as was suggested in *In re Yale Express System, Inc.,* 384 F.2d 990 (2d Cir. 1967), because such protection is too uncertain to be meaningful. (S. Rept. No. 95-989 to accompany S. 2266, 95th Cong., 2d Sess. (1978) pp. 49, 53, 54.)

Section 361 of the House amendment represents a compromise between H.R. 8200 as passed by the House and the Senate amendment regarding the issue of "adequate protection" of a secured party. The House amendment deletes the provision found in section 361(3) of H.R. 8200 as passed by the House. It would have permitted adequate protection to be provided by giving the secured party an administrative expense regarding any decrease in the value of such party's collateral. In every case there is the uncertainty that the estate will have sufficient property to pay administrative expenses in full.

Section 361(4) of H.R. 8200 as passed by the House is modified in section 361(3) of the House amendment to indicate that the court may grant other forms of adequate protection, other than an administrative expense, which will result in the realization by the secured creditor of the indubitable equivalent of the creditor's interest in property. In the special instance where there is a reserve fund maintained under the security agreement, such as in the typical bondholder case, indubitable equivalent means that the bondholders would be entitled to be protected as to the reserve fund, in addition to the regular payments needed to service the debt. Adequate protection of an interest of an entity in property is intended to protect a creditor's allowed secured claim. To the extent the protection proves to be inadequate after the fact, the creditor is entitled to a first priority administrative expense under section 507(b).

In the special case of a creditor who has elected application of creditor making an election under section 1111(b)(2), that creditor is entitled to adequate protection of the creditor's interest in property to the extent of the value of the collateral not to the extent of the creditor's allowed secured claim, which is inflated to cover a deficiency as a result of such election. (124 Cong. Rec. H 11092 (Sept. 28, 1978).)

11 USCS § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section

301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)) [15 USCS § 78eee(a)(3)], operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title [11 USCS §§ 101 et seq.], or to recover a claim against the debtor that arose before the commencement of the case under this title [11 USCS §§ 101 et seq.];

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title [11 USCS §§ 101 et seq.];

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title [11 USCS §§ 101 et seq.];

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title [11 USCS §§ 101 et seq.];

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title [11 USCS § 101 et seq.] against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)) [15 USCS § 78eee(a)(3)], does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title [11 USCS § 546(b)] or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title [11 USCS § 547(e)(2)(A)];

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title [11 USCS § 761(4)], forward contracts, or securities contracts, as defined in section 741(7) of this title [11 USCS § 741(7)], that constitutes the setoff of a claim against the debtor for a

margin payment, as defined in section 741(5) or 761(15) of this title [11 USCS §§ 741(5), 761(15)], or settlement payment, as defined in section 741(8) of this title [11 USCS § 741(8)], arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, or secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title [11 USCS § 741(5) or 761(15)], or settlement payment, as defined in section 741(8) of this title [11 USCS § 741(8)], arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title [11 USCS §§ 101 et seq.] to obtain possession of such property; or

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title [11 USCS §§ 1101 et seq.] and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) [46 USCS §§ 911 et seq.] (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively) [46 USCS § 1117 or §§ 1271 et seq., respectively], or under applicable State law; or

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title [11 USCS §§ 1101 et seq.] and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) [46 USCS §§ 911 et seq.] (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively) [46 USCS § 1117 or §§ 1271 et seq., respectively].

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title [11 USCS §§ 701 et seq.] concerning an individual or a case under chapter 9, 11, 12, or 13 of this title [11 USCS §§ 901 et seq., 1101 et seq., 1201 et seq. or 1301 et seq.], the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(Nov. 6, 1978, P. L. 95-598, Title I, § 101, 92 Stat. 2570; July 27, 1982, P. L. 97-222, § 3, 96 Stat. 235; July 10, 1984, P. L. 98-353, Title III, Subtitle A, § 304, Subtitle C, § 363(b), Subtitle F, § 392, Subtitle H, § 441, 98 Stat. 352, 363, 365, 371; Oct. 21, 1986, P. L. 99-509, Title V, Subtitle A, § 5001, 100 Stat. 1911; Oct. 27, 1986, P.L. 99-554, Title II, Subtitles B, C, §§ 257(j), 283(d) 100 Stat. 3115, 3116.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

References in text:

The "National Housing Act", referred to in this section, is Act June 27, 1934, ch 847, 48 Stat. 1246, which appears generally at 12 USCS §§ 1701 et seq. For full classification of this Act, consult USCS Tables volumes.

Effective date of section:

Section 402(a) of Act Nov. 6, 1978, provided that this section "shall take effect on October 1, 1979."

Amendments:

1982. Act July 27, 1982, in subsec. (a), in the introductory matter, inserted ", or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3))," and, in subsec (b), in the introductory matter, inserted ", or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U S.C. 78eee(a)(3))," and substituted para. (6) for one which read: "under subsection (a)(7) of this section, of the setoff of any mutual debt and claim that are commodity futures contracts, forward commodity contracts, leverage transactions, options, warrants, rights to purchase or sell commodity futures contracts or securities, or options to purchase or sell commodities or securities;".

1984. Act July 10, 1984, in subsec. (a), in para. (1), inserted "action or", and in para. (3), inserted "or to exercise control over property of the estate"; in subsec (b), in para. (3), inserted "or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A)", in para. (6), inserted "[,]financial institution," wherever appearing, [see Explanatory notes to this section], inserted "or due from" and substituted "secure, or settle commodity contracts" for "or secure commodity contracts", redesignated para. (7) as para. (8) and added a new para. (7) and, in para. (8) as redesignated, deleted "or" following the concluding semicolon, redesignated para. (8) as para. (9) and, in para. (9) as redesignated, substituted ", or" for the concluding period, and added new para. [(10)](9), and in para. (8) as redesignated, substituted "the" for "said", and purported to delete "or" following "units;", redesignated para. (8) as para. (9), and in para. [(10)](9) as so redesignated, substituted a semicolon for a concluding period; and added para. [(11)](10); in subsec. (c)(2)(B), substituted "or" for "and", in subsec. (d)(2), in the introductory matter, inserted "under subsection (a) of this section", in subsec (e), inserted "the conclusion of", and substituted two sentences beginning "The court shall order " and "If the hearing . . . ." for "If the hearing under this subsection is a preliminary hearing—

"(1) the court shall order such stay so continued if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the final hearing under subsection (d) of this section, and

"(2) such final hearing shall be commenced within thirty days after such preliminary hearing "

Such Act further in subsec. (f), substituted "Upon request of a party in interest, the" for "The", and inserted "with or", and added subsec. (h).

1986. Act Oct. 21, 1986 (applicable only to petitions [sic] filed under § 362 after August 1, 1986 and on or before December 31, 1989) replaced the period at the end of para. (b)(11) with a semicolon and added paras (b)(12) and (b)(13).

Act Oct. 27, 1986 (effective 30 days after enactment on 10/27/86, as provided by § 302(a) of such Act, which appears as 28 USCS § 581 note), in subsec. (b), in para. (6), substituted ", financial institutions" for "financial institution," each place it appears, in the first para. (9), deleted "or" following the semicolon, redesignated the second para. (9) to be para. (10), and in para. (10), as so redesignated, purported to substitute ", or" for the period; however, such amendment was executed to insert "or" following the concluding semicolon to conform to the probable intent of Congress, and redesignated former para. (10) to be para. (11); and in subsec. (c)(2)(C), inserted "12,".

Other provisions:

Effective date of amendments made by Act July 10, 1984. Act July 10, 1984, P L 98-353, Title III, Subtitle K, § 553(a), 98 Stat 392, which appears as 11 USCS § 101 note, provided that the amendments made to this section by such Act "become effective to cases filed 90 days after the date of enactment" on July 10, 1984

Report and recommendations as to (b)(12) and (b)(13) maritime provisions: Act Oct 21, 1986, P L 99-509, Title V, Subtitle A, § 5001, 100 Stat 1912 provides "Before July 1, 1989, the Secretary of Transportation and the Secretary of Commerce each shall submit a report to the Committees on Merchant Marine and Fisheries, and the Judiciary of the House of Representatives and the Committees on Commerce, Science, and Transportation, and the Judiciary of the Senate on the effects of this subsection together with any recommendations for legislation "

Legislative History

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws It gives the debtor a breathing spell from his creditors It stops all collection efforts, all harassment, and all foreclosure actions It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy

The automatic stay also provides creditor protection Without it, certain creditors would be able to pursue their own remedies against the debtor's property Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally A race of diligence by creditors for the debtor's assets prevents that (H Rept No 95-595 to accompany H R 8200, 95th Cong , 1st Sess (1977) pp 340-344)

Subsection (a) defines the scope of the automatic stay, by listing the acts that are stayed by the commencement of the case The commencement or continuation, including the issuance of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the bankruptcy case is stayed under paragraph (1) The scope of this paragraph is broad All proceedings are stayed, including arbitration, license revocation, administrative, and judicial proceedings Proceedings in this sense encompasses civil actions as well, and all proceedings even if they are not before governmental tribunals

The provision in this first paragraph prohibiting the issuance of process is designed to prevent the issuance of a writ of execution by a judgment creditor of the debtor to obtain property that was property of the debtor before the case, but that was transferred, subject to the judgment lien, before the case Because the other paragraphs of this subsection refer only to property of the estate or property of the debtor, neither of which apply to this kind of transferred property, they would not prohibit pursuit of the transferred property by issuance of process Thus, the prohibition in this paragraph is included and the judgment creditor is allowed to proceed by way of foreclosure against the property, but not by a general writ of execution (in the State court, or wherever the creditor obtained the judgment) against the debtor and all of the debtor's property

The stay is not permanent There is adequate provision for relief from the stay elsewhere in the section However, it is important that the trustee have an opportunity to inventory the debtor's position before proceeding with the administration of the case Undoubtedly the court will lift the stay for proceedings before specialized or nongovernmental tribunals to allow those proceedings to come to a conclusion Any party desiring to enforce an order in such a proceeding would thereafter have to come before the bankruptcy court to collect assets Nevertheless, it will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere

(H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.)

Section 362(a)(1) of the House amendment adopts the provision contained in the Senate amendment enjoining the commencement or continuation of a judicial, administrative, or other proceeding to recover a claim against the debtor that arose before the commencement of the case. The provision is beneficial and interacts with section 362(a)(6), which also covers assessment, to prevent harassment of the debtor with respect to pre-petition claims. (124 Cong. Rec. H 11093 (Sept. 28, 1978.).)

Paragraph (2) stays the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the bankruptcy case. Thus, execution and levy against the debtors' prepetition property are stayed, and attempts to collect a judgment from the debtor personally are stayed. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.)

Paragraph (3) stays any act to obtain possession of property of the estate (that is, property of the debtor as of the date of the filing of the petition) or property from the estate (property over which the estate has control or possession). The purpose of this provision is to prevent dismemberment of the estate. Liquidation must proceed in an orderly fashion. Any distribution of property must be by the trustee after he has had an opportunity to familiarize himself with the various rights and interests involved and with the property available for distribution. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.)

Paragraph (4) stays lien creation against property of the estate. Thus, taking possession to perfect a lien or obtaining court process is prohibited. To permit lien creation after bankruptcy would give certain creditors preferential treatment by making them secured instead of unsecured. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.)

Paragraph (5) stays any act to create or enforce a lien against property of the debtor, that is, most property that is acquired after the date of the filing of the petition, property that is exempted, or property that does not pass to the estate, to the extent that the lien secures a prepetition claim. Again, to permit postbankruptcy lien creation or enforcement would permit certain creditors to receive preferential treatment. It may also circumvent the debtors' discharge. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.)

Paragraph (6) prevents creditors from attempting in any way to collect a prepetition debt. Creditors in consumer cases occasionally telephone debtors to encourage repayment in spite of bankruptcy. Inexperienced, frightened, or ill-counseled debtors may succumb to suggestions to repay notwithstanding their bankruptcy. This provision prevents evasion of the purpose of the bankruptcy laws by sophisticated creditors. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.)

Paragraph (7) stays setoffs of mutual debts and credits between the debtor and creditors. As with all other paragraphs of subsection (a), this paragraph does not affect the right of creditors. It simply stays its enforcement pending an orderly examination of the debtor's and creditors' rights. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp.340-344.)

Section 362(a)(7) contains a provision contained in H.R. 8200 as passed by the House. The differing provision in the Senate amendment was rejected. It is not possible that a debt owing to the debtor may be offset against an interest in the debtor. (124 Cong. Rec. H 11093, H 11093 (Sept. 28, 1978).)

Section 362(a)(8) is new. The provision stays the commencement or continuation of any proceeding concerning the debtor before the U.S. Tax Court. (124 Cong. Rec. H 11093 (Sept. 28, 1978).)

Subsection (b) lists five exceptions to the automatic stay. The effect of an exception is not to make the action immune from injunction.

The court has ample other powers to stay actions not covered by the automatic

stay. Section 105, of proposed title 11, derived from Bankruptcy Act § 2a(15), grants the power to issue orders neecssary or approriate [appropriate] to carry out the provisions of title 11. The bankruptcy courts are brought within the scope of the All Writs Statute, 28 U.S.C. 1651 (1970), and are given the powers of a court of law, equity, and admiralty (H.R. 8200, § 243(a), proposed 28 U.S.C. 1481). Stays or injunctions issued under these other sections will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay. There are some actions, enumerated in the exceptions, that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.

With respect to stays issued under other powers, or the application of the automatic stay, to governmental actions, this section and the other sections mentioned are intended to be an express waiver of sovereign immunity of the Federal government, and an assertion of the bankruptcy power over State governments under the Supremacy Clause notwithstanding a State's sovereign immunity. (H. Rept. No 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.)

The first exception is of criminal proceedings against the debtor. The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.)

Paragraph (2) excepts from the stay the collection of alimony, maintenance or support from property that is not property of the estate. This will include property acquired after the commencement of the case, exempted property, and property that does not pass to the estate. The automatic stay is one means of protecting the debtor's discharge. Alimony, maintenance and support obligations are excepted from discharge. Staying collection of them, when not to the detriment of other creditors (because the collection effort is against property that is not property of the estate), does not further that goal. Moreover, it could lead to hardship on the part of the protected spouse or children. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.)

Paragraph (3) excepts any act to perfect an interest in property to the extent that the trustee's rights and powers are limited under section 546(a) of the bankruptcy code. That section permits postpetition perfection of certain liens to be effective against the trustee. If the act of perfection, such as filing, were stayed, the section would be nullified. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.)

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.)

Section 362(b)(4) indicates that the stay under section 362(a)(1) does not apply to affect the commencement or continuation of an action or proceeding by a

governmental unit to enforce the governmental unit's police or regulatory power. This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate. (124 Cong. Rec. H 11092, H 11093 (Sept. 28, 1978).)

Paragraph (6) [of subsection (b)] excepts the setoff of any mutual debt and claim for commodity transactions. (S. Rept. No. 95-989 to accompany S. 2266, 95th Cong., 2d Sess. (1978) pp. 52, 53, 55.)

Section 362(b)(6) of the House amendment adopts a provision contained in the Senate amendment restricting the exception to the automatic stay with respect to setoffs to permit only the setoff of mutual debts and claims. Traditionally, the right of setoff has been limited to mutual debts and claims and the lack of the clarifying term "mutual" in H.R. 8200 as passed by the House created an unintentional ambiguity. (124 Cong. Rec. J 11092, H 11093 (Sept. 28, 1978).)

Mr. MATHIAS.

It is the distinguished Senator's understanding that the provisons of section 362(b)(6) of the bill before us will protect the right of a commodity broker, forward contract merchant, or clearing organization to liquidate or transfer an open commodity contract held or carried for a bankrupt pursuant to existing contractual rights and that such right will not be subject to any stay sought to be imposed under this act, State law or court order?

Mr. DeConcini. Yes. (124 Cong. Rec S 17434 (Oct. 6, 1978).)

Section 3(c) is intended to clarify that, despite the automatic stay of section 362(a), a commodity broker, forward contract merchant, stockbroker, or securities clearing agency may set off a claim for a margin or settlement payment arising out of commodities contracts, forward contracts, or securities contract against cash, securities or other property which it is holding to margin, guarantee, or secure such contracts, notwithstanding the bankruptcy of the party for whose account such cash, securities, or property is held. This section does not permit a setoff which would be unlawful under any applicable law or regulation (H. Rept. No. 97-420 to accompany H.R. 4935, 97th Cong. 2d Sess. (1982) p. 3.)

Section 3(c) of H.R. 4935 would amend section 362(b)(6) of the code to clarify that a commodity broker, forward contract merchant, stockbroker, or securities clearing agency may set off a claim for a margin or settlement payment against cash, securities, or other property which it is holding, notwithstanding the bankruptcy of the party for whose account such cash, securities, or property is held and despite the automatic stay of section 362(a). This means that if a commodity or securities brokerage firm, forward contract merchant, commodity clearing organization, or securities clearing agency has a claim for a margin or settlement payment against the debtor arising, before or after the filing of the petiton, out of commodity contracts, forward contracts, or securities contracts—or the liquidation of those contracts—and holds cash, securities, or other property with respect to the same or other commodity contracts, forward contracts, or securities contracts, it would not be stayed from setting off that claim against such cash, securities, or other property, or against any amount with respect to such contracts that it would be required to pay. In the case of forward contracts the net amount due to or owing from the debtor would be the sum of the net amounts, if any, due or owing with respect to each such contract of the debtor. This section would not permit a setoff that would be unlawful under any applicable law or regulation.

. . .

Mr. MATHIAS. Mr. President, I have a question regarding the scope of section 3(c) of H.R. 4935, which basically would amend section 362(b)(6) of the code to exempt from the general stay of actions against a debtor the setoff of a claim against the debtor for a margin or settlement payment arising from a commodity contract, forward contract, or securities contract against cash, securities, or other property held by a commodity broker, forward contract merchant, or stock broker to margin, guarantee or secure other contracts of the debtor.

The language of section 3(c) is more restrictive than that of section 25(b)(3) of S. 983, the parallel provision of Senate bankruptcy technical amendments bill, which would have exempted from the automatic stay the setoff of any mutual debt and claim regarding futures contracts, forward contracts and other specified contracts. I understand that the purpose of the narrower language of section 3(c) is to prevent setoffs for charges such as commissions, or by entities such as banks, which are not necessary to achieve the market protection functions of section 362(b)(6).

I too am concerned about achievement of these market protection functions. Accordingly, my question is whether a settlement payment owed to a customer with respect to a commodity contract, forward contract, or securities contract is property held by a commodity broker, forward contract merchant, or stockbroker to guarantee or secure the customer's other contracts within the meaning of section 3(c), and may therefore be offset against a margin or settlement payment owed by the customer with respect to that or another contract.

Mr. DOLE. Yes. (128 Cong. Rec. S 8132 S 8133 (July 13, 1982).)

Paragraph (7) [(8) of subsection (b)] excepts actions by the Secretary of Housing and Urban Development to foreclose or take possession in a case of a loan insured under the National Housing Act. A general exception for such loans is found in current sections 263 and 517, the exception allowed by this paragraph is much more limited.

. . .

Upon the court's finding that the debtor has no equity in the property subject to the stay and that the property is not necessary to an effective reorganization of the debtor, the subsection requires the court grant relief from the stay. To aid in this determination, guidelines are established where the property subject to the stay is real property. An exception to "the necessary to an effective reorganization" requirement is made for real property on which no business is being conducted other than operating the real property and activities incident thereto. The intent of this exception is to reach the single-asset apartment type cases which involve primarily tax-shelter investments and for which the bankruptcy laws have provided a too facile method to relay conditions, but not the operating shopping center and hotel cases where attempts at reorganization should be permitted. Property in which the debtor has equity but which is not necessary to an effective reorganization of the debtor should be sold under section 363. Hearings under this subsection are given calendar priority to ensure that court congestion will not unduly prejudice the rights of creditors who may be obviously entitled to relief from the operation of the automatic stay. (S. Rept. No. 95-989 to accompany S. 2266, 95th Cong., 2d Sess. (1978) pp. 52, 53, 55.)

Section 362(b)(7) [(9)] of the House amendment permits the issuance of a notice of tax deficiency. The House amendment rejects section 362(b)(7) in the Senate amendment. It would have permitted a particular governmental unit to obtain a pecuniary advantage without a hearing on the merits contrary to the exceptions contained in sections 362(b)(4) and (5). (124 Cong. Rec. H 11092, H 11093 (Sept. 28, 1978).)

Subsection (c) of section 362 specifies the duration of the automatic stay. Paragraph (1) terminates a stay of an act against property of the estate when the property ceases to be property of the estate, such as by sale, abandonment, or exemption. It does not terminate the stay against property of the debtor if the property leaves the estate and goes to the debtor. Paragraph (2) terminates the stay of any other act on the earliest of the time the case is closed, the time the case is dismissed, or the time a discharge is granted or denied (unless the debtor is a corporation or partnership in a chapter 7 case).

Subsection (c) governs automatic termination of the stay. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.)

Subsections (d) through (g) govern termination of the stay by the court on the request of a party in interest. Subsection (d) requires the court, on request of a party in interest, to grant relief from the stay, such as by terminating, annulling, modifying, or conditioning the stay, for cause. The lack of adequate protection of

an interest in property of the party requesting relief from the stay is one cause for relief, but is not the only cause. As noted above, a desire to permit an action to proceed to completion in another tribunal may provide another cause. Other causes might include the lack of any connection with or interference with the pending bankruptcy case. For example, a divorce or child custody proceeding involving the debtor may bear no relation to the bankruptcy case. In that case, it should not be stayed. A probate proceeding in which the debtor is the executor or administrator of another's estate usually will not be related to the bankruptcy case, and should not be stayed. Generally, proceedings in which the debtor is a fiduciary, or involving postpetition activities of the debtor, need not be stayed because they bear no relationship to the purpose of the automatic stay, which is debtor protection from his creditors. The facts of each request will determine whether relief is appropriate under the circumstances. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.)

Section 362(d) of the House amendment represents a compromise between comparable provisions in the House bill and Senate amendment. Under section 362(d)(1) of the House amendment, the court may terminate, annul, modify, or condition the automatic stay for cause, including lack of adequate protection of an interest in property of a secured party. It is anticipated that the Rules of Bankruptcy Procedure will provide that those hearings will receive priority on the calendar. Under section 362(d)(2) the court may alternatively terminate, annul, modify, or condition the automatic stay for cause including inadequate protection for the creditor. The court shall grant relief from the stay if there is no equity and it is not necessary to an effective reorganization of the debtor.

The latter requirement is contained in section 362(d)(2). This section is intended to solve the problem of real property mortgage foreclosures of property where the bankruptcy petition is filed on the eve of foreclosure. The section is not intended to apply if the business of the debtor is managing or leasing real property, such as a hotel operation, even though the debtor has no equity if the property is necessary to an effective reorganization of the debtor. Similarly, if the debtor does have an equity in the property, there is no requirement that the property be sold under section 363 of title 11 as would have been required by the Senate amendment. (124 Cong. Rec. H 11092, H 11093 (Sept. 28, 1978).)

Subsection (e) provides a protection for secured creditors that is not available under present law. The subsection sets a time certain within which the bankruptcy court must rule on the adequacy of protection provided of the secured creditor's interest. If the court does not rule within 30 days from a request for relief from the stay, the stay is automatically terminated with respect to the property in question. In order to accommodate more complex cases, the subsection permits the court to make a preliminary ruling after a preliminary hearing. After a preliminary hearing, the court may continue the stay only if there is a reasonable likelihood that the party opposing relief from the stay will prevail at the final hearing. Because the stay is essentially an injunction, the three stages of the stay may be analogized to the three stages of an injunction. The filing of the petition which gives rise to the automatic stay is similar to a temporary restraining order. The preliminary hearing is similar to the hearing on a preliminary injunction, and the final hearing and order is similar to a permanent injunction. The main difference lies in which party must bring the issue before the court. While in the injunction setting, the party seeking the injunction must prosecute the action, in proceedings for relief from the automatic stay, the enjoined party must move. The difference does not, however, shift the burden of proof. Subsection (g) leaves that burden on the party opposing relief from the stay (that is, on the party seeking continuance of the injunction) on the issue of adequate protection.

At the expedited hearing under subsection (e), and at all hearings on relief from the stay, the only issue will be the claim of the creditor and the lack of adequate protection or existence of other cause for relief from the stay. This hearing will not be the appropriate time at which to bring in other issues, such as counterclaims against the creditor on largely unrelated matters. Those counterclaims are

not to be handled in the summary fashion that the preliminary hearing under this provision will be. Rather, they will be the subject of more complete proceedings by the trustees to recover property of the estate or to object to the allowance of a claim. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.)

Subsection (e) provides protection that is not always available under present law. The subsection sets a time certain within which the bankruptcy court must rule on the adequacy of protection provided for the secured creditor's interest. If the court does not rule within 30 days from a request by motion for relief from the stay, the stay is automatically terminated with respect to the property in question. To accommodate more complex cases, the subsection permits the court to make a preliminary ruling after a preliminary hearing. After a preliminary hearing, the court may continue the stay only if there is a reasonable likelihood that the party opposing relief from the stay will prevail at the final hearing. Because the stay is essentially an injunction, the three stages of the stay may be analogized to the three stages of an injunction. The filing of the petition which gives rise to the automatic stay is similar to a temporary restraining order. The preliminary hearing is similar to the hearing on a preliminary injunction, and the final hearing and order are similar to the hearing and issuance or denial of a permanent injunction. The main difference lies in which party must bring the issue before the court. While in the injunction setting, the party seeking the injunction must prosecute the action, in proceedings for relief from the automatic stay, the enjoined party must move. The difference does not, however, shift the burden of proof. Subsection (g) leaves that burden on the party opposing relief from the stay (that is, on the party seeking continuance of the injunction) on the issue of adequate protection and existence of an equity. It is not, however, intended to be confined strictly to the constitutional requirement. This section and the concept of adequate protection are based as much on policy grounds as on constitutional grounds. Secured creditors should not be deprived of the benefit of their bargain. There may be situations in bankruptcy where giving a secured creditor an absolute right to his bargain may be impossible or seriously detrimental to the policy of the bankruptcy laws. Thus, this section recognizes the availability of alternate means of protecting a secured creditor's interest where such steps are a necessary part of the rehabilitative process. Though the creditor might not be able to retain his lien upon the specific collateral held at the time of filing, the purpose of the section is to insure that the secured creditor receives the value for which he bargained.

. . .

The action commenced by the party seeking relief from the stay is referred to as a motion to make it clear that at the expedited hearing under subsection (e), and at hearings on relief from the stay, the only issue will be the lack of adequate protection, the debtor's equity in the property, and the necessity of the property to an effective reorganization of the debtor, or the existence of other cause for relief from the stay. This hearing will not be the appropriate time at which to bring in other issues, such as counterclaims against the creditor, which, although relevant to the question of the amount of the debt, concern largely collateral or unrelated matters. This approach is consistent with that taken in cases such as *In re Essex Properties, Ltd.*, 430 F. Supp. 1112 (N.D.Cal. 1977), that an action seeking relief from the stay is not the assertion of a claim which would give rise to the right or obligation to assert counterclaims. Those counterclaims are not to be handled in the summary fashion that the preliminary hearing under this provision will be. Rather, they will be the subject of more complete proceedings by the trustee to recover property of the estate or to object to the allowance of a claim. However, this would not preclude the party seeking continuance of the stay from presenting evidence on the existence of claims which the court may consider in exercising its discretion. What is precluded is a determination of such collateral claims on the merits at the hearing. (S. Rept. No. 95-989 to accompany S. 2266, 95th Cong., 2d Sess. (1978) pp. 52, 53, 55.)

Section 362(e) of the House amendment represents a modification of provisions

in H.R. 8200 as passed by the House and the Senate amendment to make clear that a final hearing must be commenced within 30 days after a preliminary hearing is held to determine whether a creditor will be entitled to relief from the automatic stay. In order to insure that those hearings will in fact occur within such 30-day period, it is anticipated that the rules of bankruptcy procedure provide that such final hearings receive priority on the court calendar. (124 Cong. Rec. H 11092, H 11093 (Sept. 28, 1978).)

Subsection (f) permits ex parte relief from the stay in situations in which irreparable damage might occur to the stayed party before there is opportunity for notice and a hearing under the usual procedure. The Rules of Bankruptcy Procedure will provide for a hearing soon after the issuance of any ex parte order under this subsection. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340–344.)

Section 362(g) places the burden of proof on the issue of the debtor's equity in collateral on the party requesting relief from the automatic stay and the burden on other issues on the debtor. (124 Cong. Rec. H 11092, H 11093 (Sept. 28, 1978).)

11 USCS § 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property subject to a security interest as provided in section 552(b) of this title [11 USCS § 552(b), whether existing before or after the commencement of a case under this title [11 USCS §§ 101 et seq.].

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act (15 U.S.C. 18a) [15 USCS § 18a] in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, such notification shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the tenth day after the date of the receipt of such notification, unless the court, after notice and hearing, orders otherwise.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1304, 1203, or 1204 of this title [11 USCS § 721, 1108, 1304, 1203, or 1204] and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (c) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of

bility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily.

In addition, the section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination. The courts have been developing the *Perez* rule. This section permits further development to prohibit actions by governmental or quasi-governmental organizations that perform licensing functions, such as a State bar association or a medical society, or by other organizations that can seriously affect the debtors' livelihood or fresh start, such as exclusion from a union on the basis of discharge of a debt to the union's credit union.

The effect of the section, and of further interpretations of the *Perez* rule, is to strengthen the anti-reaffirmation policy found in section 524(b). Discrimination based solely on nonpayment could encourage reaffirmations, contrary to the expressed policy.

The section is not so broad as a comparable section proposed by the Bankruptcy Commission, H.R. 31, 94th Cong., 1st Sess. § 4-508 (1975), which would have extended the prohibition to any discrimination, even by private parties. Nevertheless, it is not limiting either, as noted. The courts will continue to mark the contours of the anti-discrimination provision in pursuit of sound bankruptcy policy. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 366, 367.)

SUBCHAPTER III—THE ESTATE

11 USCS § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title [11 USCS § 329(b), 363(n) 543, 550, 553, or 723].

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title [11 USCS § 510(c) or 551].

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

USCS § 101 note, provided that the amendments made to this section by such Act "become effective to cases filed 90 days after the date of enactment" on July 10, 1984.

Legislative History

Paragraph (6) [of § 547(c)] governs prepetition setoff. Setoff, even though preferential, is protected if it occurred more than five days before the case, unless it is a setoff under circumstances which would invalidate it under section 553. If the setoff occurred within the five-day period, then it is avoidable only if the trustee may use, sell, or lease the property so recovered.

. . .

This section preserves, with some changes, the right of setoff in bankruptcy cases now found in section 68 of the Bankruptcy Act. One exception to the right is the automatic stay, discussed in connection with proposed 11 U.S.C. 362. Another is the right of the trustee to use property under section 363 that is subject to a right of setoff.

The section states that the right of setoff is unaffected by the bankruptcy code except to the extent that the creditor's claim is disallowed, the creditor acquired (other than from the debtor) the claim during the 90 days preceding the case while the debtor was insolvent, the debt being offset was incurred for the purpose of obtaining a right of setoff, while the debtor was insolvent and during the 90-day prebankruptcy period, or the creditor improved his position in the 90-day period (similar to the improvement in position test found in the preference section, 547(c)(5)). Only the last exception is an addition to current law.

As under section 547(f), the debtor is presumed to have been insolvent during the 90 days before the case. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 374, 377.)

Section 547(c)(6) of the House bill is deleted and is treated in a different fashion in section 553 of the House amendment.

. . .

Section 553 of the House amendment is derived from a similar provision contained in the Senate amendment, but is modified to clarify application of a two-point test with respect to set offs. (124 Cong. Rec. H 11097 (Sept. 28, 1978).)

11 USCS § 554. Abandonment of property of the estate

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title [11 USCS § 521(1)] not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title [11 USCS § 350].

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

(Nov. 6, 1978, P. L. 95-598, Title I, § 101, 92 Stat. 2603; July 10, 1984, P. L. 98-353, Title III, Subtitle H, § 468, 98 Stat. 380; Oct. 27, 1986, P.L. 99-554, Title II, Subtitle C, § 283(p), 100 Stat. 3118.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Section 402(a) of Act Nov. 6, 1978, provided that this section "shall take effect on October 1, 1979.".

Amendments:

1984. Act July 10, 1984, in subsecs. (a) and (b), inserted "and benefit"; substituted subsec. (c) for one which read: "Unless the court orders otherwise, any property that is scheduled under section 521(1) of this title and that is not administered before a case is closed under section 350 of this title is deemed abandoned."; and, in subsec. (d), deleted "section (a) or (b) of" preceding "this section".

1986. Act Oct. 27, 1986 (effective 30 days after enactment on 10/27/86, as provided by § 302(a) of such Act, which appears as 28 USCS § 581 note), in subsec. (c), substituted "521(1)" for "521(a)(1)".

Other provisions:

Effective date of amendments made by Act July 10, 1984. Act July 10, 1984, P. L. 98-353, Title III, Subtitle K, § 553(a), 98 Stat. 392, which appears as 11 USCS § 101 note, provided that the amendments made to this section by such Act "become effective to cases filed 90 days after the date of enactment" on July 10, 1984.

Legislative History

This section authorizes the court to authorize the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate. Abandonment may be to any party with a possessory interest in the property abandoned. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) p. 377.)

In order to aid administration of the case, subsection (b) deems the court to have authorized abandonment of any property that is scheduled under section 521(1) and that is not administered before the case is closed. That property is deemed abandoned to the debtor. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) p. 377.)

Section 554(b) is new and permits a party in interest to request the court to order the trustee to abandon property of the estate that is burdensome to the estate or that is of inconsequential value to the estate. (124 Cong. Rec. H 11098 (Sept. 28, 1978).)

Subsection (c) specifies that if property is neither abandoned nor administered it remains property of the estate. (H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong. 1st Sess. (1977) p. 377.)

11 USCS § 555. Contractual right to liquidate a securities contract

The exercise of a contractual right of a stockbroker, financial institution, or securities clearing agency to cause the liquidation of a securities contract, as defined in section 741(7) [11 USCS § 741(7)], because of a condition of the kind specified in section 365(e)(1) of this title [11 USCS § 365(e)(1)] shall not be stayed, avoided, or otherwise limited by operation of any provision of this title [11 USCS §§ 101 et seq.] or by order of a court or administrative agency in any proceeding under this title [11 USCS §§ 101 et seq.] unless such order is authorized under the provisions of the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.) [15 USCS §§ 78aaa et seq.] or any statute administered by the Securities and Exchange Commission. As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a national securities exchange, a national securities association, or a securities clearing agency.

(July 27, 1982, P. L. 97-222, § 6(a), 96 Stat. 236; July 10, 1984, P. L. 98-353, Title III, Subtitle H, § 469, 98 Stat. 380.)

matter jurisdiction. Buchler v United States (1974, DC Cal) 384 F Supp 709.

28 USCS § 2409a does not confer jurisdiction on federal courts; jurisdiction over quiet title action involving United States is provided specifically by 28 USCS § 1346(f). Morrison v Morrison (1976, DC Tex) 408 F Supp 315.

After United States disclaimed all interest in land, it was inappropriate for Federal District Court to retain jurisdiction of quiet title action, and action was dismissed pursuant to 28 USCS § 2409a; court could not retain jurisdiction on theory of pendent jurisdiction. W. H. Pugh Coal Co. v United States (1976, DC Wis) 418 F Supp 538.

Annotations:

Scope of Federal District Court's jurisdiction under 28 USCS §§ 1347, 2409, over suits by tenant in common or joint tenant for partition of lands where United States is one of tenants in common or joint tenants. 29 ALR Fed 571.

3. Counterclaim

Argument that since term "party defendant" is used in 28 USCS § 2409a, defendant can only present quiet title action via complaint and not by counterclaim was wholly without merit. United States v Phillips (1973, DC Neb) 362 F Supp 462.

4. Disclaimer

Federal District Court, pursuant to 28 USCS § 2409a(d), confirmed disclaimer of United States in view of quitclaim deed which effectively conveyed interest of United States in property in question to state of Wisconsin. W. H. Pugh Coal Co. v United States (1976, DC Wis) 418 F Supp 538.

5. Equitable defenses against United States

Contention that Congress intended by enactment of 28 USCS § 2409a to expose Government to doctrines of estoppel and laches was rejected. Wackerli v Morton (1975, DC Idaho) 390 F Supp 962.

6. Limitations period

Plaintiffs who did not know of government's claim to land prior to 1962, and who amended their complaint to bring it within terms of 28 USCS § 2409a in March, 1973 were not barred from bringing action by 12-year limitations period of § 2409a. Wackerli v Morton (1975, DC Idaho) 390 F Supp 962.

12-year limitations bar of 28 USCS § 2409a(f) begins to run on date when claim of United States became known or should have become known, and not on later date when statute was passed. Hatter v United States (1975, DC Cal) 402 F Supp 1192.

7. —Nature of claim asserted

For purposes of limitations period, 28 USCS § 2409a(f) makes no distinction between legal or equitable claims but speaks only of disputes in title to real property in which United States claims interest. Hatter v United States (1975, DC Cal) 402 F Supp 1192.

8. Sufficiency of complaint

Complaint under 28 USCS § 2409a is insufficient and will be dismissed unless it states with particularity nature of plaintiffs' right, title or interest, circumstances under which land was acquired, right, title or interest claimed by United States, and date on which plaintiffs or their predecessors in interest knew or should have known of claims of United States. Buchler v United States (1974, DC Cal) 384 F Supp 709.

Complaint failed to state claim upon which relief might be granted pursuant to 28 USCS § 2409a, where complaint asserted that cloud upon title to unimproved realty was imposed by designation of lands to be adjacent lands within wild river area and by institution of eminent domain proceedings to acquire scenic easements over portions of lands. Middlefork Ranch, Inc. v Butz (1975, DC Idaho) 393 F Supp 624.

§ 2410. Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title [28 USCS § 1444] for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period shall be 120 days or the period allowable for redemption under State law, whichever is longer, and in any case in which, under the provisions of section 505 of the Housing Act of 1950, as amended (12 U.S.C. 1701k) [12 USCS § 1701k], and subsection (d) of section 1820 of title 38 of the United States Code [38 USCS § 1820], the right to redeem does not arise, there shall be no right of redemption. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head (or his delegate) of the department or agency of the United

States which has charge of the administration of the laws in respect to which the claim of the United States arises.

(d) In any case in which the United States redeems real property under this section or section 7425 of the Internal Revenue Code of 1954 [26 USCS § 7425], the amount to be paid for such property shall be the sum of—

(1) the actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale),

(2) interest on the amount paid (as determined under paragraph (1)) at 6 percent per annum from the date of such sale, and

(3) the amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used by the purchaser) a reasonable rental value of such property.

(e) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

(June 25, 1948, c. 646, § 1, 62 Stat. 972; May 24, 1949, c. 139, § 119, 63 Stat. 105; July 7, 1958, P. L. 85-508, § 12(h), 72 Stat. 348; June 11, 1960, P. L. 85-507, § 1(20), 74 Stat. 201; Nov. 2, 1966, P. L. 89-719, Title II, § 201, 80 Stat. 1147.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

This section is based on Act Mar. 4, 1931, c. 515, §§ 1, 2, 4, 5, 46 Stat. 1528, 1529; May 17, 1932, c. 190, 47 Stat. 158; June 25, 1936, c. 804, 49 Stat. 1921; June 6, 1940, c. 242, 54 Stat. 234; Dec. 2, 1942, c. 656, §§ 1–3, 56 Stat. 1026 (§§ 901, 902, 904, and 905 of former Title 28).

Provisions including the districts of Hawaii and Puerto Rico, and the District Court of the United States for the District of Columbia, in former 28 USCS § 901 were omitted as covered by "any district court." See 28 USCS § 451. Provisions in former 28 USCS § 902 relating to process were omitted as covered by Rule 4 of the Federal Rules of Civil Procedure.

Amendments (with effective dates):

1949. Act May 24, 1949 inserted the second [later third] sentence of subsec. (b) and "In such actions" and "such" preceding "service" in the third [later fourth] sentence.

1958. Act July 7, 1958 (effective 1/3/59, by Proc. No. 3269, 24 Fed. Reg. 81, 73 Stat. c. 16, as required by §§ 1 and 8(c) of P. L. 85-508). Sec. 12(h) deleted "including the District Court for the Territory of Alaska," following "district court," in subsec. (a).

1960. Act June 11, 1960, inserted "or by certified mail," in subsec. (b).

1966. Act Nov. 2, 1966, substituted the dash and all that follows it for ", to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." in subsec. (a); inserted "or pleading" and the second sentence of subsec. (b); substituted "judgment or decree" for "judicial sale" and "the mortgage or other lien" for "liens and encumbrances", added the second sentence and the exception in the fourth sentence, and inserted "(or his delegate)" in the last sentence of subsec. (c); added subsec. (d); and redesignated former subsec. (d) to be (e).

CROSS REFERENCES

Interpleader, generally, 28 USCS §§ 1335, 1397, 2361.
Removal of actions brought under 28 USCS § 2410 from state court to federal court, 28 USCS § 1444.
This section referred to in 12 USCS § 1071k; 26 USCS §§ 7424, 7425, 7810; 28 USCS § 1444; 38 USCS § 1820.

RESEARCH GUIDE

Am Jur:

32 Am Jur 2d, Federal Practice and Procedure § 482.
35 Am Jur 2d, Federal Tax Enforcement §§ 64, 65.
47 Am Jur 2d, Judicial Sales §§ 137, 270, 271, 335, 336, 344, 348.
55 Am Jur 2d, Mortgages §§ 9, 873, 890, 891.
77 Am Jur 2d, United States § 122.

Forms:

10 Am Jur Legal Forms 2d, Judicial and Execution Sales § 158:52.
11 Am Jur Pl & Pr Forms (Rev ed), Federal Practice and Procedure, Form 1441.
11 Am Jur Pl & Pr Forms (Rev ed), Federal Tax Enforcement, Form 21.
18 Am Jur Pl & Pr Forms (Rev ed), Mortgages, Form 154.

Annotations:

Construction and application of statute (28 USC § 2410(a)(c)) dealing with actions affecting property on which the United States has a lien. 5 L Ed 2d 867.
When period for filing petition for removal of civil action from State Court to Federal District Court begins to run under 28 USCS § 1446(b). 16 ALR Fed 287.

Right to attack merits of assessment, in proceeding under 26 USC § 7403 to enforce, or under 28 USC § 2410 to discharge, federal tax lien. 100 ALR2d 869.

INTERPRETIVE NOTES AND DECISIONS

I. IN GENERAL

II. APPLICATION TO PARTICULAR ACTIONS

III. PRACTICE AND PROCEDURE

I. IN GENERAL

1. Generally

Congress has power to establish rules governing state-created property rights in so far as these rights affect property rights of United States. United States v John Hancock Mut. Life Ins. Co. (1960) 364 US 301, 5 L Ed 2d 1, 81 S Ct 1.

28 USCS § 2410 provides, inter alia, that United States may be named as party in state court civil action involving adjudication of lien claims, including those of United States. United States v Hunt (1975, CA10 Wyo) 513 F2d 129.

2. Purpose

Predecessor of 28 USCS § 2410 was limited in purpose and application to situations involving quieting of title or foreclosing or mortgages or other liens on real or personal property, and clearing real estate titles of questionable or valueless government liens. Schmitz v Societe Internationale (1966, DC Dist Col) 249 F Supp 757, cert den 387 US 908, 18 L Ed 2d 626, 87 S Ct 1684.

28 USCS § 2410(a) was enacted for threefold purpose: (1) to permit joinder where lien of United States was junior to that foreclosed, (2) to permit inquiry by junior lienor into procedural irregularities of United States lien, but not underlying assessment itself, and, (3) to permit discharge of United States liens that have been eliminated, but not yet canceled. Shaw v United States (1970, DC Vt) 321 F Supp 1267.

Purpose of predecessor of 28 USCS § 2410 was to waive federal government's sovereign immunity from suit in type of cases to which it refers and to authorize suit to be brought against United States Lavenburg v Universal Sportwear (1950) 198 Misc 318, 98 NYS2d 160

3. Waiver of immunity

Purpose of predecessor of 28 USCS § 2410 was merely to waive sovereign immunity from suit in certain types of cases, not to confer jurisdiction on courts to hear and determine such cases in ordinary sense Wells v Long (1947, CA9 Idaho) 162 F2d 842

Predecessor of 28 USCS § 2410 constituted mere waiver of immunity by United States, and its consent to be sued in actions within scope of such section Seattle Asso of Credit Men v United States (1957, CA9 Wash) 240 F2d 906, United States v Cless (1958, CA3 Pa) 254 F2d 590; Remis v United States (1960, CA1 Mass) 273 F2d 293

By successfully moving for dismissal as to it on grounds of sovereign immunity, United States indicated that it had or claimed no lien upon fund which was subject of litigation, within purview of predecessor of 28 USCS § 2410 Bank of Hawaii v Benchwick (1966, DC Hawaii) 249 F Supp 74

Government waives its sovereign immunity under 28 USCS § 2410 in those suits which seek to determine relative position of government lien on property, as against other lienors, and those suits which question validity of lien in reference to compliance or noncompliance with statutory and constitutional requirements of due process Yannicelli v Nash (1973, DC NJ) 354 F Supp 143

28 USCS § 2410 waives sovereign immunity of United States where Government is named as party in civil action to quiet title to real or personal property on which United States "has or claims a mortgage or other lien", § 2410 is not jurisdictional grant Globe Products Corp v United States (1974, DC Md) 386 F Supp 319

Predecessor to 28 USCS § 2410 did not include consent of United States to be sued where United States was claiming title and not lien Sissman v Chicago Title & Trust Co (1941) 375 Ill 514, 32 NE2d 132

4. Construction, generally

Both 26 USCS § 7424, under which private lienor may file petition in federal District Court for leave to file action for final determination of all claims to or liens upon property to which federal tax lien has attached, and predecessor of 28 USCS § 2410 are purely permissive in tenor United States v Brosnan (1960) 363 US 237, 4 L Ed 2d 1192, 80 S Ct 1108

28 USCS § 2410, as waiver of sovereign immunity of United States, must be strictly construed Haggard v Lancaster (1970, DC Miss) 320 F Supp 1252

5. Interests of United States subject to adjudication

Predecessor of 28 USCS § 2410 did not apply where United States claimed absolute title to real property involved Riordan v Ferguson (1945, CA2 NY) 147 F2d 983, Bertie's Apple Valley Farms v United States (1973, CA9 Idaho) 476 F2d 291, Wells v Long (1946, DC Idaho) 68 F Supp 671, affd (CA9 Idaho) 162 F2d 842, Hull v Tollefson (1956, DC ND) 138 F Supp 315, Brown v Johnson (1974, DC Tex) 373 F Supp 973

Predecessor of 28 USCS § 2410 did not authorize action brought for purpose of terminating consent agreement Ford Bros & Co v Eddington Distilling Co (1939, DC Pa) 30 F Supp 213

Provisions of predecessor of 28 USCS § 2410 did not authorize suit to set aside private sale by private party, alleged to have been authorized by Internal Revenue Service, with understanding that no bid would be accepted unless approved by Internal Revenue Service, such action was not within actions named for which immunity was waived by 28 USCS § 2410 Baumohl v Columbia Jewelry Co (1955, DC Md) 127 F Supp 865

Action instituted by plaintiff against United States under predecessor of 28 USCS § 2410 to recover sum of money which allegedly was wrongfully given by third party to collector of internal revenue, and thereafter placed in United States Treasury at time when plaintiff possessed lien on such fund, superior to tax lien urged by collector in gaining possession of money, was not action "affecting property on which United States has a lien" as contemplated by predecessor of 28 USCS § 2410(a) Tri-State Ins Co v United States (1955, DC Okla) 129 F Supp 115

Provisions of former 28 USCS § 2410 did not apply to suit by plaintiff to restrain government from collecting penalties for violations of acts of Congress fixing wheat quotas, even though statute provided for lien upon entire crop of wheat produced on farm for amount of penalty for excess grown Shinaberry v United States (1956, DC Mich) 142 F Supp 413, affd (CA6 Mich) 242 F2d 758, cert den 353 US 976, 1 L Ed 2d 1137, 77 S Ct 1060

Absent its consent to be sued, District Court did not have jurisdiction over United States in action for specific performance of agreement between plaintiffs and certain of defendants for

sale of real estate, on which it was alleged that agency of United States held mortgage. Shaw v Rippel (1963, DC Ill) 224 F Supp 77.

Predecessor of 28 USCS § 2410 applied only to suits relating to government liens, and did not apply to suit against United States in which it was alleged in complaint that United States had attempted condemnation of land in which plaintiffs owned mineral interests and that condemnation proceedings did not vest title to minerals in United States, but that United States, notwithstanding lack of title, committed trespasses upon mineral interests. Stewart v United States (1957, CA5 Tex) 242 F2d 49.

Former 28 USCS § 2410 did not include situations where United States claims title interest, as distinguished from lien interest; court would not extend meaning of former § 2410 so as to hold that Congress consented to suit against United States in such situation. Zager v United States (1966, DC Wis) 256 F Supp 396.

Funds deposited as bail for criminal defendant are not subject to lien of government so as to subject government to action under predecessor of 28 USCS § 2410; if, upon final determination of criminal case, fine results as to defendant, government may perfect its lien to enforce criminal fine as in civil judgment. Bank of Hawaii v Benchwick (1966, DC Hawaii) 249 F Supp 74.

28 USCS § 2410, permitting United States to assert its interest in state proceeding, speaks only to lien interest. Isham v Blount (1974, DC Tenn) 373 F Supp 1376.

6. Establishment of lien priorities

Under ordinary circumstances, validity of county tax foreclosure proceeding would be governed by state law, but, where federal lien is involved and action is brought under federal statute, decision of United States courts must govern; thus, court must hold that earlier federal tax lien is superior to later county tax lien, although state law provides that county tax liens are superior to all liens prior in time. United States v Howard (1966, DC Or) 254 F Supp 499.

In action in which jurisdiction is predicated on 28 USCS § 2410, federal rule for determining relative priority between federal lien and state-created lien is "first in time, first in right." Kimbell Foods, Inc. v Republic Nat. Bank (1975, DC Tex) 401 F Supp 316.

7. Application of state law

Law of state where property is situated controls question whether United States, after having been joined under former 28 USCS § 2410 in action brought in state court for foreclosure of property on which United States claims junior mortgage, is entitled to payment of its claims in full upon redemption by mortgagor or only to such debts as have been declared liens by state courts. United States v John Hancock Mut. Life Ins. Co. (1960) 364 US 301, 5 L Ed 2d 1, 81 S Ct 1.

8. Administrative waiver of liens [28 USCS § 2410(e)]

28 USCS § 2410(e) waives United States privileges concerning actions affecting property on which United States has lien. United States v Deya (1974, DC Puerto Rico) 369 F Supp 1113.

II. APPLICATION TO PARTICULAR ACTIONS

A. Actions to Quiet Title [28 USCS § 2410(a)(1)]

9. Generally

Jurisdiction conferred by former 28 USCS § 2410 was not dependent upon relief sought; thus, in action to quiet title, it was not necessary to seek sale of property in order to vest court with jurisdiction over United States. United States v Morrison (1957, CA5 Tex) 247 F2d 285.

Action to quiet title, where delinquent taxpayer's state liquor license was levied upon and sold under federal tax lien, is not undermined by fact that license is personal rather than real property; although suits to quiet title traditionally involved real property, where action is governed by federal rather than state law, 28 USCS § 2410 contemplates actions to quiet title to personalty on which United States has or claims lien. Aqua Bar & Lounge, Inc. v United States Dept. of Treasury Internal Revenue Service (1976, CA3) 539 F2d 935.

In context of 28 USCS § 2410, words "quiet title" are not used in limited sense. Law v United States Dept. of Agriculture (1973, DC Ga) 366 F Supp 1233.

10. When action will not lie

Where United States claimed title to property rather than mortgage or other lien interest therein, 28 USCS § 2410 did not authorize suit against United States in quiet title action. Bertie's Apple Valley Farms v United States (1973, CA9 Idaho) 476 F2d 291.

Proceeding to enforce attorney's lien for fee was not proceeding to quiet title or for foreclosure of mortgage or other lien upon real or personal property within contemplation of former 28 USCS § 2410. Lavenburg v Universal Sportswear, Inc. (1950, DC NY) 92 F Supp 473.

Former 28 USCS § 2410 did not waive immunity of United States in action to quiet title

where record title is vested in United States. Hull v Tollefson (1956, DC ND) 138 F Supp 315.

Action seeking to restrain government from collecting penalties for violation of wheat quota is not action to quiet title to wheat, even though government has asserted lien on wheat, and former 28 USCS § 2410 does not confer government's consent to be sued in such action. Shinaberry v United States (1956, DC Mich) 142 F Supp 413, affd (CA6 Mich) 242 F2d 758, cert den 353 US 976, 1 L Ed 2d 1137, 77 S Ct 1060.

Action for "general determination" of water rights under state law, in which governmental agencies of United States were named as claimants to water involved, was not type of proceeding which was within original jurisdiction of District Court under former 28 USCS § 2410(a), even though proceeding partook of nature of suit to quiet title. Re Green River Drainage Area (1956, DC Utah) 147 F Supp 127.

Suit characterized as one for injunctive relief, can nevertheless be in nature of suit to quiet title, and thus, be maintained under 28 USCS § 2410; however, United States could not be made party to action under 28 USCS § 2410(a)(1) or (2), where interest of United States in insuring a low income housing project could not be classified as "lien" within 28 USCS § 2410(a)(2) and thus not removable under 28 USCS § 1440. Haggard v Lancaster (1970, DC Miss) 320 F Supp 1252.

11. Judgment liens

Surviving children of intestate judgment debtors may maintain action under 28 USCS § 2410 against United States, judgment creditor, to quiet title to real property held by parents, where United States allowed judgment lien to become dormant under state law, by failing to cause execution to issue within time provided therefor; judgment in favor of United States does not create such "interest" in real property as to preclude action against it under 28 USCS § 2410, as interest resulting from judgment is lien. Matthews v Heirs, Exrs., Admrs., Devisees, Trustees & Assigns of Matthews (1974, DC Okla) 378 F Supp 693.

12. Tax liens

Federal District Court, as jurisdictional prerequisite in suit to quiet title from federal tax lien, need not order foreclosure. United States v Morrison (1957, CA5 Tex) 247 F2d 285.

State court had jurisdiction of action against United States to quiet title to land conveyed to plaintiff wife by taxpayer husband some 2 years prior to filing of collector's notice of tax lien against husband; and provisions of Internal Revenue Code of 1939, requiring consent of Commissioner or federal District Court as condition precedent to maintaining quiet title action against claimed tax lien of United States, was not applicable. Smith v United States (1958, CA6 Ohio) 254 F2d 865.

Words "quiet title" used in former 28 USCS § 2410(a), included suit to remove cloud on plaintiff's title arising because of tax lien claimed by government. United States v Coson (1961, CA9 Cal) 286 F2d 453.

Action to quiet title under 28 USCS § 2410 is proper proceeding to be brought by delinquent taxpayer, whose state liquor license has been levied upon and sold under federal tax lien. Aqua Bar & Lounge, Inc. v United States Dept. of Treasury Internal Revenue Service (1976, CA3) 539 F2d 935.

Although labeled "Petition to Quiet Title", complaint which, in effect, merely sought to enjoin United States from collecting taxes (complaint deviating from procedures set forth by Congress with respect to refund of taxes), was not action within contemplation of former 28 USCS § 2410. Viviano v United States (1952, DC Mich) 105 F Supp 312.

Suit brought by husband and wife to quiet title to properties owned by them as estates by entireties, upon which government asserted tax lien, was subject to provisions of former 28 USCS § 2410. Bernstein v United States (1952, DC Mo) 106 F Supp 233.

Purchasers of real property who overlooked federal tax liens duly filed for record, but instead relied upon grantor's affidavit that property was free of liens, could not maintain action to quiet title against United States. Pipola v Chicco (1959, DC NY) 169 F Supp 229, mod on other grounds (CA2 NY) 274 F2d 909 (ovrld on other grounds United States v O'Connor (CA2 NY) 291 F2d 520, 100 ALR2d 858).

Federal District Court had jurisdiction of action by beneficiary praying that court order and direct insurance company pay specified sum of money and interest from date obligation accrued in favor of plaintiff and to quiet title to proceeds of life insurance policy as against alleged liens of United States and District Director of Internal Revenue. Guttman v United States (1961, DC NY) 196 F Supp 384.

13. Defective title

Plaintiff in action against United States to quiet title could not prevail under 28 USCS § 2410 where land in question was never conveyed to plaintiff's predecessor in interest. Gendron v United States (1974, DC Cal) 402 F Supp 46, affd (CA9 Cal) 524 F2d 1154.

B. Actions to Foreclose Mortgage or Other Lien [28 USCS § 2410(a)(2)]

14. When action will lie

Action under predecessor of 28 USCS § 2410 to foreclose mortgage on realty which had been acquired by Federal Housing Administrator upon default of insured FHA loan secured by mortgage on property could be maintained, as against contention that property was really owned by United States and hence not subject to execution or suit. Riordan v Ferguson (1945, CA2 NY) 147 F2d 983.

Proceeding to enforce attorney's lien for fee was not proceeding to quiet title or for foreclosure of mortgage or other lien upon real or personal property within contemplation of former 28 USCS § 2410. Lavenburg v Universal Sportswear, Inc. (1950, DC NY) 92 F Supp 473.

15. Effect of junior federal lien

In absence of congressional determination to contrary, junior federal tax lien on mortgaged property is effectively extinguished by private or judicial sale of property in state proceedings to which United States was not, and was not required to be, party, where under state law such sale has effect of extinguishing junior liens even though their holders were not, nor required to be made, parties to proceedings. United States v Brosnan (1960) 363 US 237, 4 L Ed 2d 1192, 80 S Ct 1108.

First sentence of former 28 USCS § 2410(c), providing that judicial sale in action involving property to which United States claims lien shall have same effect respecting discharge of property from liens held by United States as may be provided by local law of place where property is situated, is qualified by propositions following first sentence, among them redemption privilege of United States; only way in which United States, in its capacity as junior lienor, can be joined in foreclosure proceedings was pursuant to terms of former 28 USCS § 2410, since United States has not otherwise waived sovereign immunity in this type of situation. United States v John Hancock Mut. Life Ins. Co. (1960) 364 US 301, 5 L Ed 2d 1, 81 S Ct 1.

Second mortgage lien held by United States may be extinguished upon foreclosure of prior lien in accordance with Pennsylvania practice, whereby foreclosure of prior mortgage divests all subsequent liens on real estate and joinder of subordinate lienors in action is not necessary and it is not necessary to give them actual notice; and former 28 USCS § 2410 was not intended to require joinder of United States, but was merely waiver of sovereign immunity by consent to be sued in those situations where foreclosing creditor might be required to join United States as junior lienor under local law. United States v Cless (1958, CA3 Pa) 254 F2d 590.

Subordinate tax liens of United States were divested upon foreclosure of purchase money mortgage. American Casualty Co. v Southern Materials Co. (1958, CA4 Va) 261 F2d 197.

Action may be brought against United States by secured creditor under 28 USCS § 2410, to assert its senior lien against property upon which junior federal lien has been foreclosed. Northwest Equipment Sales Co. v Western Packers, Inc. (1976, CA9 Idaho) 543 F2d 65.

United States was not necessary party in proceedings for foreclosure of mortgage where mortgagor was in default of payments and United States had tax lien on property junior to mortgage, and mortgagee for consideration paid, secured release of all claims of United States under tax lien. McNally v Currigan (1956) 134 Colo 188, 301 P2d 136.

Federal tax liens filed after recording of mortgage, institution of suit to foreclose and filing of lis pendens, were discharged so far as mortgaged property was concerned. Puritan Dairy Products Co. v Christoffers (1959) 54 NJ Super 102, 148 A2d 223.

16. Foreclosure sale

No decree of foreclosure could be made under predecessor of 28 USCS § 2410(c), unless it provided for sale of mortgaged property. Integrity Trust Co. v United States (1933, DC NJ) 3 F Supp 577.

Provisions of predecessor of 28 USCS § 2410(a) giving consent of United States to be named party in any suit to foreclose mortgage or other lien on realty, permitted relief only by sale of property subject to lien. Ford Bros. & Co. v Eddington Distilling Co. (1939, DC Pa) 30 F Supp 213.

Where trial court granted defendant's motion for strict foreclosure of mortgage on real estate against which United States asserted tax lien, jurisdiction over United States was lost, and, in view of 28 USCS § 2410(c), that United States shall be party in foreclosure proceeding only where foreclosure by sale is sought, judgment of strict foreclosure which purported to vest absolute title in redeeming incumbrancer was not binding on United States. City Sav. Bank v Lawler (1972) 163 Conn 149, 302 A2d 252.

17. Redemption, generally [28 USCS § 2410(c)]

United States, as second mortgagee of real estate judicially foreclosed in proceeding to which United States was made party under former 28 USCS § 2410, was entitled to redeem, within 1 year from date of sale pursuant to former 28 USCS § 2410(c), despite conflicting

state statute giving mortgagor exclusive right to redeem within that period; inconsistent provisions of state law must fall under supremacy clause of USCS Constitution, Art VI; redemption privilege of United States under former 28 USCS § 2410(c) was not affected by fact that federal agency concerned is authorized by another federal statute to bid at foreclosure sale, at least where authority of agency is not limited to so bidding. United States v John Hancock Mut. Life Ins. Co. (1960) 364 US 301, 5 L Ed 2d 1, 81 S Ct 1.

Provisions of 28 USCS § 2410(d) are not unconstitutional, as denying due process of law, for failure to require hearing before government may exercise its right of redemption under 28 USCS § 2410; in case of any real dispute involving exercise of right of redemption, persons affected by government's action may maintain suit under § 2410 to protect their interests. Equity Mortg. Corp. v Loftus (1974, CA4 Va) 504 F2d 1071.

Where value of property at time of mortgage foreclosure by bank was less than indebtedness and bank agreed to sell property to third person, court, in action by bank to quiet title against subsequent tax lien of United States, ordered such lien canceled of record where United States had not redeemed property within 1 year, as provided by former 28 USCS § 2410. Miners Sav. Bank v United States (1953, DC Pa) 110 F Supp 563.

28 USCS § 2410(c), giving government right of redemption, affects only title to mortgaged premises for one year after foreclosure sale, and cannot be invoked by tenant seeking to continue tenancy during that period. Metropolitan Life Ins. Co. v Rochester Area Council of Churches Development, Inc. (1973) 76 Misc 2d 839, 351 NYS2d 782, affd without opinion 43 App Div 2d 905, 352 NYS2d 598.

18. —Payment [28 USCS § 2410(d)]

In order to redeem from sale under duly recorded mortgage, United States, as holder of junior tax liens, was required under former 28 USCS § 2410 to tender full amount of mortgage debt. United States v Brosnan (1959, CA3 Pa) 264 F2d 762, affd on other grounds 363 US 237, 4 L Ed 2d 1192, 80 S Ct 1108.

"The expenses necessarily incurred in connection with such property" under 28 USCS § 2410(d)(3) include redemption expenses to prevent destruction of title, that is, expenses essential to continued vitality of junior liens. Equity Mortg. Corp. v Loftus (1974, CA4 Va) 504 F2d 1071.

United States was required, under former 28 USCS § 2410, in seeking to make redemption after sale of property to satisfy senior lien, to tender full amount of prior mortgage debt, rather than amount bid in by purchaser at foreclosure sale; term "redeem" as used in 28 USCS § 2410, could not be interpreted to include only amount realized at sale, since to do so would enable federal government, by offering such amount, to assume position of senior lienholder, thereby gaining advantage which it could not have secured either before or at foreclosure sale. First Bank & Trust Co. v MacGarvie (1956) 22 NJ 539, 126 A2d 880.

19. —Credit of lienor's account

Upon government acquiring title to property through redemption procedure provided for by 28 USCS § 2410(c), mortgagor whose mortgage has been foreclosed, is entitled to credit against his account by government in amount government would have paid at foreclosure sale. Connecticut Mut. Life Ins. Co. v Carter (1971, CA5 Fla) 446 F2d 136, cert den 404 US 857, 30 L Ed 2d 98, 92 S Ct 104 and cert den 404 US 1000, 30 L Ed 2d 553, 92 S Ct 563.

C. Interpleader Actions [28 USCS § 2410(a)(5)]

20. Generally

When provisions of former 28 USCS § 2410 were broadened by Federal Tax Lien Act of 1966, Congress broadened government's consent to be sued to include actions in nature of interpleader; in so doing, interpleader actions were considered to be those suits brought by persons holding property for purpose of determining who is entitled to property held, which definition is in accord with traditional definition. Johnson Service Co. v H.S. Kaiser Co. (1971, DC Ill) 324 F Supp 745.

21. When action will lie

District Court had jurisdiction of United States in interpleader suit by 7 insurance companies wherein Collector of Internal Revenue was made party defendant if collector was claiming lien on proceeds of fire insurance policies for payment of taxes of insured. United States v Sentinel Fire Ins. Co. (1949, CA5 Miss) 178 F2d 217.

Department of Agriculture, by interpleading with soil bank payment in action between vendee and vendor of land, did not render itself subject to action under 28 USCS § 2410(a)(5), as interpleader was not with respect to real or personal property on which government claimed mortgage or other lien. Wood v Deweese (1969, DC Ky) 305 F Supp 939.

In action under predecessor of 28 USCS § 2410 to foreclose trust deed covering real estate on which it was alleged federal government

claimed tax lien, state court had jurisdiction as to United States without request by trustee to Collector of Internal Revenue. Douglas Properties v Stix (1935) 118 Fla 354, 159 So 1.

United States was proper party, under former 28 USCS § 2410, to be interpleaded in action by supplier of materials against contractor and subcontractor to recover for materials supplied to subcontractor, since United States had tax liens against defendant subcontractor. Lemar Paint Products Co. v Dimiceli (1956) 3 Misc 2d 705, 155 NYS2d 534.

Action by mortgagee of real property was not in "interpleader or in the nature of interpleader" within 28 USCS § 2410(a)(5) where stakeholder was insurer and not mortgagee. South Brooklyn Sav. Bank v All State Ins. Co. (1975) 84 Misc 2d 287, 375 NYS2d 273.

D. Actions Involving Tax Liens

22. Generally

Federal tax liens are wholly creatures of federal statute, but state law governs divestiture of federal tax liens, except to extent that Congress may have entered field; neither 26 USCS § 7424, dealing with civil actions to clear title to property to which federal tax lien has attached, nor former 28 USCS § 2410, disclosed intent to exclude otherwise available state procedures which may result in divestiture of federal tax lien. United States v Brosnan (1960) 363 US 237, 4 L Ed 2d 1192, 80 S Ct 1108.

United States may not be sued under 28 USCS § 2410, where tax lien levy has been released and is no longer outstanding. Nickerson v United States (1975, CA1 RI) 513 F2d 31.

23. Attack on validity of lien, generally

Federal District Court had jurisdiction of action to quiet title to specific parcels of real property owned by plaintiff brought under former 28 USCS § 2410, against which United States claimed lien for unpaid withholding, employment, and cabaret taxes of partnership in which plaintiff was limited partner, and where plaintiff contended that there was no lien because taxes never had been assessed against him. Coson v United States (1958, DC Cal) 169 F Supp 671, mod (CA9 Cal) 286 F2d 453.

Federal District Court had jurisdiction of action brought under former 28 USCS § 2410 to expunge United States tax liens and quiet title to real property of plaintiffs, which liens had been assessed under jeopardy assessments against plaintiffs as transferees. Sonitz v United States (1963, DC NJ) 221 F Supp 762.

Upon determination in favor of taxpayer in proceeding to cancel tax assessment, if government fails to cancel assessment and issue certificate of release of lien within reasonable period of time after judgment of court becomes final and after written request therefor by taxpayer, it would be appropriate for taxpayer to institute legal proceedings to force such action pursuant to 28 USCS § 2410. Kurio v United States (1968, DC Tex) 281 F Supp 252.

28 USCS § 2410(a) did not intend to change traditional rule of "pay first and litigate later" as it pertains to liens for taxes. Shaw v United States (1970, DC Vt) 321 F Supp 1267.

In ordinary refund suit, taxpayer's failure to exhaust administrative remedies would probably prevent judicial review; however, such failure is not fatal to bringing suit under 28 USCS § 2410 to challenge validity of jeopardy assessment lien and levy procedure; under appropriate circumstances, taxpayer may clearly invoke 28 USCS § 2410 as available jurisdictional base upon which to specifically challenge validity of particular government procedures and methods used to collect tax assessment from taxpayer; however, in such action, judicial review is appropriately restricted to examining possible violations of taxpayer's constitutional rights alleged to have occurred during course of tax collection proceedings. Yannicelli v Nash (1973, DC NJ) 354 F Supp 143.

24. —Determination of title against which lien asserted

Under predecessor of 28 USCS § 2410, United States could be made party to action against Collector of Internal Revenue in which, in order to grant relief sought, it was necessary to adjudge whether beneficial title to undivided interest in leases owned by plaintiff corporation ever vested in individual taxpayer. Jones v Tower Production Co. (1943, CA10 Okla) 138 F2d 675.

Action brought against Collector of Internal Revenue to determine title and interest in funds against which collector had issued warrant of distraint, was not action to enjoin collection of tax as contended by collector, but was action to determine right of United States under tax lien asserted against fund, and, United States being necessary party, had, under predecessor of 28 USCS § 2410, consented to be sued. Adler v Nicholas (1948, CA10 Colo) 166 F2d 674.

Action to quiet title under 28 USCS § 2410(a) will lie where delinquent taxpayer sought to resolve title to state liquor license levied upon and sold by United States under tax lien, so long as taxpayer does not seek to attack validity of assessment. Aqua Bar & Lounge, Inc. v United States Dept. of Treasury Internal Revenue Service (1976, CA3) 539 F2d 935.

Declaratory judgment action by husband and

wife brought under former 28 USCS § 2410 for declaration that tax lien based on premarriage tax lien of husband did not attach to community property of husband and wife, could be sustained. Stone v United States (1963, DC Wash) 225 F Supp 201.

Former 28 USCS § 2410 did not provide vehicle for taxpayer to question validity of tax assessment or lien; thus, where government asserted that given individual was taxpayer and levied against property of that person, § 2410 could not be construed as waiving government's immunity in suit to question validity of that lien, even where one bringing suit asserted that lien was on her property, but she was not taxpayer in question. McCann v United States (1965, DC Pa) 248 F Supp 585.

25. Attack on validity of assessment

Federal government, in seeking aid of courts in enforcing tax assessment in any form, opens assessment to judicial scrutiny in all respects. United States v O'Connor (CA2 NY) 291 F2d 520, 100 ALR2d 858.

Former 28 USCS § 2410 did not give government's consent to suit to quiet title by taxpayer to test underlying merits of tax assessment, and without such consent jurisdiction of court was lacking. Broadwell v United States (1965, CA4 NC) 343 F2d 470, cert den 382 US 825, 15 L Ed 2d 70, 86 S Ct 57; Batts v United States (1964, DC NC) 228 F Supp 272.

Taxpayer cannot dispute validity of tax assessment under guise of quiet title action, without having first paid outstanding assessment; and, even suing as marital community, husband and wife do not become such third party as is authorized to bring suit under 28 USCS § 2410. Mulcahy v United States (1968, CA5 Tex) 388 F2d 300.

Action to quiet title under 28 USCS § 2410(a) will lie where delinquent taxpayer sought to resolve title to state liquor license levied upon and sold by United States under tax lien, so long as taxpayer does not seek to attack validity of assessment. Aqua Bar & Lounge, Inc. v United States Dept. of Treasury Internal Revenue Service (1976, CA3) 539 F2d 935.

Provisions of former 28 USCS § 2410(a) did not permit joinder of United States as defendant in suit, primary purpose of which suit was to ascertain tax liability. Viviano v United States (1952, DC Mich) 105 F Supp 312; Commercial Credit Corp. v Schwartz (1954, DC Ark) 126 F Supp 728; Gordon v Bank of America Nat. Trust & Sav. Asso. (1957, DC Cal) 150 F Supp 772.

Former 28 USCS § 2410 did not constitute waiver of sovereign immunity so as to permit United States to be joined as party in action to quiet title to property by transferee taxpayer against whom jeopardy assessments have been made and liens filed and to permit taxpayer to inquire into merits of underlying assessments in determining validity of tax lien. Cooper Agency, Inc. v McLeod (1964, DC SC) 235 F Supp 276, affd (CA4 SC) 348 F2d 919.

Former 28 USCS § 2410 was intended to permit United States to be joined as party in limited class of cases; section was not intended to grant jurisdiction over suit by taxpayer to question amount of taxes due. Seff v Machiz (1965, DC Md) 246 F Supp 823.

Former 28 USCS § 2410 did not provide vehicle for taxpayer to question validity of tax assessment or lien. McCann v United States (1965, DC Pa) 248 F Supp 585.

In actions brought under 28 USCS § 2410, where tax lien is involved, sovereign immunity is waived and subject matter jurisdiction conferred on court, provided that plaintiff refrains from collaterally attacking merits of government's tax assessment itself; thus, where plaintiff questions only legality of procedure used to enforce jeopardy assessment, and not validity of jeopardy assessment itself, suit falls within jurisdictional scope of 28 USCS § 2410. Yannicelli v Nash (1972, DC NJ) 354 F Supp 143.

In light of legislative history of 28 USCS § 2410(a), consent of government, given under that section, does not extend to taxpayer's attack on merits of tax assessment, through vehicle of suit to quiet title; taxes are to be collected first, challenges to those taxes may then be litigated, and 28 USCS § 2410 has very curtailed function in that it gives parties other than taxpayer, opportunity to litigate limited set of questions with regard to government liens on property in which they had interest. Globe Products Corp. v United States (1974, DC Md) 386 F Supp 319.

Annotations:

Right to attack merits of assessment, in proceeding under 26 USC § 7403 to enforce, or under 28 USC § 2410 to discharge, federal tax lien. 100 ALR2d 869.

26. Attack on enforcement of lien

One against whose property United States asserts tax lien, who is not taxpayer and is thus precluded from challenging assessment under 28 USCS § 1346(a)(1), may bring action against government under 28 USCS § 2410, if government attempts to enforce lien by levy. Busse v United States (1976, CA7 Ill) 542 F2d 421.

District Court had jurisdiction to entertain, under former 28 USCS § 2410, action to enjoin

government from enforcing tax liens against plaintiffs' property, where it was asserted and disclosed to satisfaction of court, that liens were invalid or were result of arbitrary and capricious conduct. Sanders v Andrews (1954, DC Okla) 121 F Supp 584, revd on other grounds (CA10) 225 F2d 629, cert den 350 US 967, 100 L Ed 839, 76 S Ct 435.

Former 28 USCS § 2410 was intended to permit United States to be joined as party in limited class of cases; section was not intended to grant jurisdiction over suit by taxpayer to question amount of taxes due or to enjoin enforcement of tax lien. Seff v MacHiz (1965, DC Md) 246 F Supp 823.

27. Standing to attack

One against whose property United States asserts tax lien, who is not taxpayer and is thus precluded from challenging assessment under 28 USCS § 1346(a)(1), may bring action against government under 28 USCS § 2410, if government attempts to enforce lien by levy. Busse v United States (1976, CA7 Ill) 542 F2d 421.

One who was not party to tax claim of United States, although having no remedy for relief under Internal Revenue Code, had adequate remedy under former 28 USCS § 2410 to test validity of tax lien filed against his real property, in any state court having jurisdiction or in any federal court in which plaintiff could invoke jurisdiction. Petition of Sills (1953, DC NY) 115 F Supp 239.

Taxpayer cannot dispute validity of tax assessment under guise of quiet title action, without having first paid outstanding assessment; and, even suing as marital community, husband and wife do not become such third party, as is authorized to bring suit under 28 USCS § 2410. Mulcahy v United States (1968, CA5 Tex) 388 F2d 300.

28. Resolution of conflicting tax liens

Litigation, removed at instance of United States from state court to federal court, involving contest between city and the United States over priority for satisfaction of their respective tax claims out of property seized, was cognizable by court under provisions of former 28 USCS § 2410(a). New York v Evigo Corp. (1954, DC NY) 121 F Supp 748.

29. Foreclosure of state tax liens

United States cannot be party to suit to foreclose tax sales certificates without its consent. Kenilworth v Corwine (1951, DC NJ) 96 F Supp 68.

30. Subrogation to tax lien

In action by taxpayer and her second husband to recover damages by reason of second husband's satisfaction of joint federal income tax liability incurred by taxpayer and her first husband, in which plaintiffs alleged that Internal Revenue Service had reneged on agreement that plaintiff husband would be subrogated to right of IRS against first husband and would acquire thereby a tax lien on certain property, court lacked jurisdiction under 28 USCS § 2410 to grant relief in form of determination that plaintiff husband's tax lien was superior to rights of United States in subject property. Jorrie v Imperial Invest. Co. (1973, DC Tex) 355 F Supp 1088.

31. Tax sales

Taxpayer who alleged that his property was advertised and sold, after levy, for payment of back income taxes contrary to 26 USCS § 6335, has right of action under that section, but has no remedy for enforcing it except under 28 USCS § 2410(a), which waives sovereign immunity. Little River Farms, Inc. v United States (1971, DC Ga) 328 F Supp 476.

III. PRACTICE AND PROCEDURE

32. Jurisdiction of District Court, generally

Action under predecessor of 28 USCS § 2410 to quiet title against United States and another defendant could not be brought in federal District Court where complaint did not allege diversity of citizenship or disclose any other basis for federal jurisdiction.

Provisions of former 28 USCS § 2410 presupposed that federal court in which suit was pending or brought had jurisdiction thereof on grounds independent of such section; § 2410 was not, in itself, grant of federal jurisdiction. Seattle Asso. of Credit Men v United States (1957, CA9 Wash) 240 F2d 906; Remis v United States (1960, CA1 Mass) 273 F2d 293; Haldeman v United States (1950, DC Mich) 93 F Supp 889; Tompkins v United States (1959, DC Tex) 172 F Supp 204; Schmitz v Societe Internationale (1966, DC Dist Col) 249 F Supp 757, cert den 387 US 908, 18 L Ed 2d 626, 87 S Ct 1684.

Provisions of former 28 USCS § 2410, as integral part of Judicial Code, established specific jurisdiction for suits contemplated by such section, either by direct action or by removal. United States v Morrison (1957, CA5 Tex) 247 F2d 285.

Former 28 USCS § 2410 waived sovereign immunity, but did not authorize suit unless there are jurisdictional grounds independent of that section. Remis v United States (1960, CA1 Mass) 273 F2d 293.

Provisions of 28 USCS § 2410(a)(5) do not implicitly abandon diversity requirement in inter-

pleader proceedings when United States is defendant; 28 USCS § 2410(a)(5) presupposes valid interpleader action, as such provision, though waiving sovereign immunity, does not, in addition thereto, confer jurisdiction upon federal courts. Kent v Northern California Regional Office of American Friends Service Committee (1974, CA9 Cal) 497 F2d 1325.

Purpose of former 28 USCS § 2410 was not to confer jurisdiction on District Courts to entertain such cases as provided for by such section, but rather to waive sovereign immunity of United States in such cases where another independent ground of jurisdiction already exists. Jones v United States (1959, DC Cal) 179 F Supp 456.

28 USCS § 2410 is not jurisdiction-conferring statute but is merely legislative act waiving sovereign immunity; hence, if jurisdiction is to exist, some other statutory basis must provide it. American Fidelity Fire Ins. Co. v Construcciones Werl, Inc. (1975, DC VI) 407 F Supp 164.

33. —Removal

Upon removal of action from state court, in which action United States had been made party pursuant to 28 USCS § 2410, and upon determination of case on its merits by federal trial court, on appeal, Court of Appeals can consider only whether District Court could have had original jurisdiction of parties, and cannot consider whether case was properly removed from the state court. Grubbs v General Electric Credit Corp. (1972) 405 US 699, 31 L Ed 2d 612, 92 S Ct 1344.

Upon removal from state court of action brought under provisions of predecessor of 28 USCS § 2410, pursuant to provisions of 28 USCS § 1444, federal court acquired jurisdiction to entertain action. Wells v Long (1947, CA9 Idaho) 162 F2d 842; Vincent v P. R. Matthews Co. (1954, DC NY) 126 F Supp 102; First Nat. Bank v United States (1959, DC Tex) 172 F Supp 757.

United States, by removing case under 28 USCS § 1444, from state court in which action was brought under former 28 USCS § 2410, to federal court, invokes jurisdiction of federal court and, consequently, federal court has jurisdiction, even though it would not have had jurisdiction if action had originally been brought in federal court. Hood v United States (1958, CA9 Wash) 256 F2d 522.

Where plaintiffs brought action in state court under former 28 USCS § 2410 to quiet title to lands upon which United States claimed reclamation project liens, and United States removed to federal District Court, latter had jurisdiction of action though no lien claim upon any of several parcels of land amounted to jurisdictional amount. Hood v United States (1958, CA9 Wash) 256 F2d 522.

Where plaintiff filed action to enforce lien under state law in which United States was party to proceeding, United States had no right of removal through former 28 USCS § 2410, since action was not to quiet title or to foreclose mortgage or other lien upon real or personal property. Lavenburg v Universal Sportwear, Inc. (1950, DC NY) 92 F Supp 473.

United States was indispensable party to proceeding involving priority between city and federal tax liens, in which District Director of Internal Revenue was served with order to show cause why he should not be restrained from enforcing federal liens and such tax should not be liens vacated; hence, proceedings were removed to federal District Court. New York v Evigo Corp. (1954, DC NY) 121 F Supp 748.

Waiver of immunity to suit granted by former 28 USCS § 2410 is conditioned upon right of removal to federal District Court provided in 28 USCS § 1444. Vincent v P. R. Matthews Co. (1954, DC NY) 126 F Supp 102.

Removal of proceeding by United States, pursuant to 28 USCS § 1444, of state court action brought under former 28 USCS § 2410, to appropriate federal court, is not waiver of government's objection to jurisdiction of federal court; thus, after removal from state court, federal court could dismiss action for want of federal jurisdiction. Herter v Helmsley-Spear, Inc. (1957, DC NY) 149 F Supp 713.

Although action brought under former 28 USCS § 2410 had been removed from state court, federal court had no jurisdiction to entertain such action where court would have had no jurisdiction to entertain such action, if it had orginally been brought in federal court. George v United States (1960, DC Tex) 181 F Supp 522.

Waiver of immunity of United States to be sued in state court under former 28 USCS § 2410 is granted upon condition prescribed in 28 USCS § 1444, which gave United States unqualified option to remove such action to federal District Court; therefore, there is no basis upon which District Court can remand case to state court over objection of United States. Hamlin v Hamlin (1964, DC Miss) 237 F Supp 299.

Interest of Federal Housing Administration as insurer of mortgage loan, is not such interest as would fall within purview of 28 USCS § 2410(a); interest of United States in such situation, although difficult to define with precision, is

clearly not "lien" under 28 USCS § 2410, and, therefore, such action would not be subject to removal under 28 USCS § 1444. Haggard v Lancaster (1970, DC Miss) 320 F Supp 1252.

Jurisdiction of federal court on removal is derivative jurisdiction, and if state court lacked jurisdiction either of subject matter or of parties, federal court acquires none upon removal; thus, where action claimed by plaintiff to be in nature of interpleader is brought against federal government under 28 USCS § 2410, and such action is removed to federal court, court can dismiss action as to United States where it determines that such action is not, in fact, in nature of interpleader. Johnson Service Co. v H.S. Kaiser Co. (1971, DC Ill) 324 F Supp 745.

Domestic action by husband against wife in which United States is made party pursuant to 28 USCS § 2410, may be removed to Federal District Court under 28 USCS § 1444, for limited purposes of determining issues pertaining to government's tax lien and its validity and application to certain property of parties; federal court will not become involved in any of divorce or domestic features of case, and, when questions pertaining to federal government are determined, case will be remanded to state court for further determination of domestic features of case; if necessary in interim, federal court may remand any of domestic features of case which, for some reason, may require urgent attention by state court. Rostykus v Rostykus (1972, DC Okla) 352 F Supp 62.

Where action seeking to impress mechanic's lien on certain residential property which was subject to deed of trust held by Farmers Home Administration was properly within jurisdiction of state court under 28 USCS § 2410(a), Federal Court had subject matter jurisdiction to entertain action upon removal from state court under 28 USCS § 1444. E. C. Robinson Lumber Co. v Hughes (1972, DC Mo) 355 F Supp 1363.

34. Pleading

City Bank of Anchorage v Eagleston (1953, DC Alaska) 110 F Supp 429.

In order to get case in group of actions to which sovereignty is waived by former 28 USCS § 2410, plaintiff has to plead that action is one for quieting of title or foreclosure and that United States has or claims mortgage or other lien on property. Ansonia Nat. Bank v United States (1956, DC Conn) 147 F Supp 864.

35. Joinder

General rule that United States, by seeking affirmative relief in state court, subjects itself to all incidents of state law which govern other suitors, is not applicable to proceeding which was not initiated by United States but by private party who joined United States pursuant to former 28 USC § 2410; and, where state law requires joinder of United States as party to foreclosure proceedings, § 2410 was mandatorily applicable. United States v John Hancock Mut. Life Ins. Co. (1960) 364 US 301, 5 L Ed 2d 1, 81 S Ct 1.

Under former 28 USCS § 2410, it was proper to sue United States alone in state court. George v United States (1960, DC Tex) 181 F Supp 522.

In order to join United States as defendant as provided for in former 28 USCS § 2410, private lien sought to be foreclosed must have encumbered same property that United States' lien encumbered; thus, where mechanic's lien encumbered parcel of improved real property, and United States' lien encumbered debt allegedly owed by subcontractor to general contractor, action against United States would be dismissed for want of jurisdiction as not being within waiver of immunity under former § 2410(a). S. & E. Bldg. Materials Co. v Joseph P. Day, Inc. (1960, DC NY) 188 F Supp 742.

Provisions of 28 USCS § 2410 are not mandatory, and do not require that United States be joined as party in proceeding which could have been brought under § 2410. Haggard v Lancaster (1970, DC Miss) 320 F Supp 1252.

Where civil litigation involving conflicting claims of ownership of property and receivership was pending in state court having jurisdiction of subject matter, and where certain parties, by intervention duly allowed, sought foreclosure of mortgages and loan deeds on property on which United States claimed lien under jeopardy assessments issued by collector for unpaid income taxes, United States may be made party thereto under provisions of former 28 USCS § 2410. United States v Bullard (1952) 209 Ga 426, 73 SE2d 179.

36. Stay of proceedings

Where plaintiff wife brought action in state court against United States to quiet title to land conveyed to her by her husband, against claimed tax lien against husband, which action United States did not remove to federal District Court, but later brought action against both husband and wife in latter court to foreclose tax lien, District Court, in first instance, properly stayed further proceedings in that court pending determination of prior state court action. Smith v United States (1958, CA6 Ohio) 254 F2d 865.

37. Effect of judgment

Action by Internal Revenue Service to set aside transfer of certain real property as fraudulent against government and to impress and foreclose equitable lien on property was barred by earlier state court quiet title action under principles of res judicata. United States v Perry (1973, CA5 Ala) 473 F2d 643.

COLLATERAL REFERENCES

Am. Jur. 2d. — 7 Am. Jur. 2d Attorneys at Law § 6; 61A Am. Jur. 2d Pleading §§ 350 to 352.

C.J.S. — 7 C.J.S. Attorney and Client § 15; 71 C.J.S. Pleading §§ 408, 409, 411, 413.

A.L.R. — Construction of phrase "usual place of abode," or similar terms referring to abode, residence, or domicil, as used in statutes relating to service of process, 32 A.L.R.3d 112.

Key Numbers. — Attorney and Client ⇐ 90; Pleading ⇐ 331 to 338.

Rule 6. Time.

(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b) and 73(a) and (g), except to the extent and under the conditions stated in them.

(c) **Unaffected by expiration of term.** The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) **For motions — Affidavits.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) **Additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Compiler's Notes. — This rule is substantially identical to Rule 6, F.R.C.P.

Rules 73(a) and (g), referred to near the end of Subdivision (b), were deleted, effective January 1, 1985. See Rules of the Utah Supreme Court.

Cross-References. — Amendment to pleadings to conform to evidence, time of motion for, Rule 15(b).

Commencement of action, service by mail, Rule 3(a).

Corporation or association, mailing of process to, Rule 4(e)(4).

Depositions, objections to errors and irregularities, Rule 32(d).

Discharge of attachment or release of property, Rule 64C(f).

Documents for state or subdivision, filing date on weekend or holiday, § 63-37-3.

Election laws, Sundays included in computation of time, § 20-1-12.

Failure of term, change of time of holding court, process does not abate, § 78-7-10.

Failure of term or vacancy in office of judge, proceeding not affected, § 78-7-21.

Jury venire, service by mail, § 78-46-13.

Juvenile Court Act, time computed according to Rules of Civil Procedure, § 78-3a-27.

Legal holidays enumerated, § 63-13-2.

New trial, time of motion for, after judgment notwithstanding the verdict, Rule 50(c)(2).

Order defined, Rule 7(b)(2).

Pleadings and other papers, service by mail, Rule 5(b)(1).

Probate Code, mailing of notice of hearing, § 75-1-401.

Proceedings commenced may continue beyond time for expiration of term, § 78-7-11.

Reference to master, time of first meeting of parties after, Rule 53(d)(1).

Relief from judgment or order, time for motion, Rule 60.

Rules by district courts, Rule 83.

Service by mail, Rule 5(b)(1).

Substitution of parties, time of motion for, Rule 25.

Summons mailed as alternative to service by publication, Rule 4(f)(2).

Time, how computed, § 68-3-7.

Tribunal, board or office exceeding jurisdiction, notice, Rule 65B(e).

Undertaking by nonresident plaintiff, timely filing, Rule 12(k).

When a day appointed is a holiday, § 68-3-8.

NOTES TO DECISIONS

Analysis

Additional time after service by mail.

—Failure to add days.

——Waiver of objection.

Counsel waived his right to object to the failure to add three days to the five-day notice period where notice of his two disciplinary hearings was mailed to him, since he did not object at the time of either hearing to the notice he received, and he showed no prejudice

resulting from the shortened time period. In re McCune 717 P.2d 701 (Utah 1986).

—Industrial commission.

Subdivision (e) is not inconsistent nor clearly inapplicable with the procedure of the Industrial Commission and therefore supplements the procedure of the commission. Griffith v. Industrial Comm'n, 16 Utah 2d 264, 399 P.2d 204 (1965).

Computation.

—Months and years.

One month is a calendar month, not a lunar month of 28 days, nor is it necessarily 30 days. Such a month commences at beginning of day of month in which period starts and ends at expiration of day before same day of next month. In re Lynch's Estate, 123 Utah 57, 254 P.2d 454 (1953).

When the time period is measured in months or years from a certain date, the day from which the time period is to run is excluded and the same calendar date of the final month or year is included. Gilroy v. Lowe, 626 P.2d 469 (Utah 1981).

—Sundays.

Notice of appeal was timely filed when the last day for filing was a Sunday and the appeal notice was filed the following day. Glad v. Glad, 567 P.2d 160 (Utah 1977).

Enlargement.

—Motion for new trial.

Defendants' motion for new trial filed more than ten days after entry of judgment was not timely under Rules 52(b) or 59(b), and under this rule trial court may not extend time for taking any action under these rules except to extent or under conditions stated in them; subsequent untimely appeal from denial of motion would be dismissed on plaintiff's motion; after original dismissal of appeal neither district court nor Supreme Court had jurisdiction to reinstate it. Holbrook v. Hodson, 24 Utah 2d 120, 466 P.2d 843 (1970).

—Notice of appeal.

Neither this rule nor Rule 60(b)(1) applies where notice of appeal has not been filed in time. Anderson v. Anderson, 3 Utah 2d 277, 282 P.2d 845 (1955).

——Designation of record.

Attorney who files notice of appeal is charged with knowledge of ten-day period within which to file designation of record on appeal; he may file for extension of time under this rule but may not, in the alternative, later claim excusable neglect. Nunley v. Stan Katz Real Estate, Inc., 15 Utah 2d 126, 388 P.2d 798 (1964).

—Redemption from execution sales.

A court, sitting in equity, may in appropriate instances extend the period for redemption from sales on execution. Mollerup v. Storage Sys. Int'l, 569 P.2d 1122 (Utah 1977).

Motions and affidavits.

—Applicability of rule.

——Court orders.

The five-day notice of hearing provision of Subdivision (d) does not apply to orders made by a court, such as a show cause order. Bott v. Bott, 20 Utah 2d 329, 437 P.2d 684 (1968).

——New trial.

Provision that notice of hearing on motion be served not later than five days before the time specified for the hearing does not apply to motion for new trial and such notice is not integral part of motion for new trial; rule does not change procedure whereby a motion can be called up at any time parties desire to do so. Howard v. Howard, 11 Utah 2d 149, 356 P.2d 275 (1960).

—Compliance with rule.

——Actual notice.

The trial court may dispense with technical compliance with the five-day notice provision of Subdivision (d) if there is satisfactory proof that a party had actual notice and time to prepare to meet the questions raised by the motion. Jensen v. Eames, 30 Utah 2d 423, 519 P.2d 236 (1974).

——Ineffective notice.

Eight days' notice of trial was ineffective to give five days' notice when notice was by mail, since Saturday, Sunday, and three days for mailing were to be deducted from eight-day period. Mickelson v. Shelley, 542 P.2d 740 (Utah 1975).

——Time to prepare.

Plaintiff was not prejudiced by two-day notice of hearing to release property subject to writ of attachment where he had adequate time to prepare for hearing and defendant was required to post cashier's check in lieu of security. Jensen v. Eames, 30 Utah 2d 423, 519 P.2d 236 (1974).

—Continuance.

——Surprise.

Neither plaintiff's failure to serve motion for continuance five days before date set for hearing nor failure to file affidavits accompanying motion justified denial of motion where plaintiff's counsel did not learn of reason for plaintiff's inability to appear at hearing in time to make motion five days before hearing and Rule 40(b) does not expressly require affidavits to accompany motion for continuance. Bairas v. Johnson, 13 Utah 2d 269, 373 P.2d 375 (1962).

Cited in Goddard v. Bundy, 121 Utah 299, 241 P.2d 462 (1952); Mower v. Bohmke, 9 Utah 2d 52, 337 P.2d 429 (1959); Western States Thrift & Loan Co. v. Blomquist, 29 Utah 2d 58, 504 P.2d 1019 (1972); Connelly v. Rathjen, 547 P.2d 1336 (Utah 1976); Genuine Parts Co. v. Larson, 555 P.2d 285 (Utah 1976); McEwen Irrigation Co. v. Michaud, 558 P.2d 606 (Utah 1976); Utah Chiropractic Ass'n v. Equitable Life Assurance Soc'y, 579 P.2d 1327 (Utah 1978); Reagan Outdoor Adv., Inc. v. Utah Dep't of Transp., 589 P.2d 782 (Utah 1979); Albrecht v. Uranium Servs., Inc., 596 P.2d 1025 (Utah 1979); Ute-Cal Land Dev. v. Intermountain Stock Exch., 628 P.2d 1278 (Utah 1981); Bennion v. Hansen, 699 P.2d 757 (Utah 1985).

COLLATERAL REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d Courts § 48; 56 Am. Jur. 2d Motions, Rules, and Orders § 10; 58 Am. Jur. 2d Notice §§ 26 to 30; 62 Am. Jur. 2d Process §§ 33, 34, 65.

C.J.S. — 21 C.J.S. Courts § 153; 60 C.J.S. Motions and Orders § 8; 66 C.J.S. Notice § 18; 71 C.J.S. Pleading §§ 98, 114, 219; 72 C.J.S. Process §§ 33, 51.

A.L.R. — Vacating judgment or granting new trial in civil case, consent as ground of after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Medical expense, when incurred under policy providing for payment of expenses incurred within fixed period of time from date of injury, 10 A.L.R.3d 468.

Attorney's inaction as excuse for failure to timely prosecute action, 15 A.L.R.3d 674.

What circumstances excuse failure to submit will for probate within time limit set by statute, 17 A.L.R.3d 1361.

Construction and effect of contractual or statutory provisions fixing time within which arbitration award must be made, 56 A.L.R.3d 815.

Extension of time within which spouse may elect to accept or renounce will, 59 A.L.R.3d 767.

Validity of service of summons or complaint on Sunday or holiday, 63 A.L.R.3d 423.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Consequences of prosecution's failure to file timely brief in appeal by accused, 27 A.L.R.4th 213.

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time, 32 A.L.R.4th 840.

Proper date for valuation of property being distributed pursuant to divorce, 34 A.L.R.4th 63.

Key Numbers. — Courts ⇐ 68; Motions ⇐ 10; Notice ⇐ 10, 11; Pleading ⇐ 85, 199; Process ⇐ 63, 82.

PART III.

PLEADINGS, MOTIONS, AND ORDERS.

Rule 7. Pleadings allowed; form of motions.

(a) **Pleadings.** There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) **Motions, orders and other papers.**

(1) **Motions.** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) **Orders.** An order includes every direction of the court including a minute order made and entered in writing and not included in a judg-

against land. Brunswick Realty Co. v. University Inv. Co., 43 Utah 75, 134 P. 608 (1913).

Quiet title.

Former tender statute referred to an action for the recovery of money only, and tender was not necessary for award of costs in action to quiet title. Pacific Bond & Mtg. Co. v. Beaver County, 97 Utah 62, 89 P.2d 476 (1939).

Waiver of defects.

While ordinarily tender had to be kept good by bringing or depositing the money into court, yet a plaintiff could waive this right, and ordinarily, where he failed to bring to trial court's attention the fact that money was not produced in court, he did waive his right in that regard; more especially was that true where tender was by check and money to meet same was at all times in bank on which drawn. Hirsh v. Ogden Furn. & Carpet Co., 48 Utah 434, 160 P. 283 (1916).

COLLATERAL REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d Costs §§ 23, 24.

C.J.S. — 20 C.J.S. Costs § 76 et seq.

Key Numbers. — Costs ⇐ 42.

Rule 69. Execution and proceedings supplemental thereto.

(a) **Issuance of writ of execution.** Process to enforce a judgment shall be by a writ of execution unless the court otherwise directs, which may issue at any time within eight years after the entry of judgment, (except an execution may be stayed pursuant to Rule 62) either in the county in which such judgment was rendered, or in any county in which a transcript thereof has been filed and docketed in the office of the clerk of the district court. Notwithstanding the death of a party after judgment execution thereon may be issued, or such judgment may be enforced, as follows:

(1) In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest.

(2) In case of the death of the judgment debtor, if the judgment is for the recovery of real or personal property or the enforcement of a lien thereon.

(b) **Contents of writ and to whom it may be directed.** The writ of execution must be issued in the name of the state of Utah, sealed with the seal of the court and subscribed by the clerk. It may be issued to the sheriff of any county in the state (and may be issued at the same time to different counties) but where it requires the delivery of possession or sale of real property, it must be issued to the sheriff of the county where the property or some part thereof is situated. If it requires delivery of possession or sale of personal property, it may be issued to a constable. It must intelligibly refer to the judgment, stating the court, the county where the same is entered or docketed, the names of the parties, the judgment, and, if it is for money, the amount thereof, and the amount actually due thereon. It shall be directed to the sheriff of the county in which it is to be executed in cases involving real property, and shall require the officer to proceed in accordance with the terms of the writ; provided that if such writ is against the property of the judgment debtor generally it may direct the constable to satisfy the judgment, with interest, out of the personal property of the debtor, and if sufficient personal property cannot be found, then the sheriff shall satisfy the judgment, with interest, out of his real property.

If the judgment requires the sale of property, the writ of execution shall recite such judgment, or the material parts thereof, and direct the officer to

execute the judgment by making the sale and applying the proceeds in conformity therewith. The judgment creditor may require a certified copy of the judgment to be served with the execution upon the party against whom the judgment was rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

(c) **When writ to be returned.** The writ of execution shall be made returnable at any time within two months after its receipt by the officer. It shall be returned to the court from which it issued, and when it is returned the clerk must attach it to the record.

(d) **Service of the writ.** Unless the execution otherwise directs, the officer must execute the writ against the property of the judgment debtor by levying on a sufficient amount of property, if there is sufficient [property]; collecting or selling the choses in action and selling the other property, and paying to the judgment creditor or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within view of the officer, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated is amply sufficient to satisfy the judgment and costs.

When an officer has begun to serve an execution issued out of any court on or before the return day of such execution he may complete the service and return thereof after such return day. If he shall have begun to serve an execution, and shall die or be incapable of completing the service and return thereof, the same may be completed by any other officer who might by law execute the same if delivered to him; and if the first officer shall not have made a certificate of his doings, the second officer shall certify whatever he shall find to have been done by the first, and shall add thereto a certificate of his own doings in completing the service.

(e) **Proceedings on sale of property.**

(1) **Notice.** Before the sale of the property on execution notice thereof must be given as follows: (1) in case of perishable property, by posting written notice of the time and place of sale in three public places of the precinct or city where the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property; (2) in case of other personal property, by posting a similar notice in at least three public places of the precinct or city where the sale is to take place, for not less than 7 nor more than 14 days; (3) in case of real property, by posting a similar notice, particularly describing the property, for 21 days, on the property to be sold, at the place of sale, and also in at least 3 public places of the precinct or city where the property to be sold is situated, and publishing a copy thereof at least 3 times, once a week for 3 successive weeks immediately preceding the sale, in some newspaper published in the county, if there is one.

(2) **Postponement.** If at the time appointed for the sale of any real or personal property on execution the officer shall deem it expedient and for the interest of all persons concerned to postpone the sale for want of purchasers, or other sufficient cause, he may postpone the same from time to time, until the same shall be completed; and in every such case he shall make public declaration thereof at the time and place previously ap-

pointed for the sale, and if such postponement is for a longer time than one day, notice thereof shall be given in the same manner as the original notice of such sale is required to be given.

(3) **Conduct of sale.** All sales of property under execution must be made at auction to the highest bidder, between the hours of 9 o'clock a.m. and 5 o'clock p.m. After sufficient property has been sold to satisfy the execution no more shall be sold. Neither the officer holding the execution nor his deputy shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery it must be within view of those who attend the sale, and it must be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. All sales of real property must be made at the courthouse of the county in which the property, or some part thereof, is situated. The judgment debtor, if present at the sale, may also direct the order in which the property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the officer must follow such directions.

(4) **Purchaser refusing to pay.** Every bid shall be deemed an irrevocable offer; and if the purchaser refuses to pay the amount bid by him for the property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss is occasioned thereby, the party refusing to pay, in addition to being liable on such bid, is guilty of a contempt of court and may be punished accordingly. When a purchaser refuses to pay, the officer may also, in his discretion, thereafter reject any other bid of such person.

(5) **Personal property.** When the purchaser of any personal property pays the purchase money, the officer making the sale shall deliver the property to the purchaser (if such property is capable of manual delivery) and shall execute and deliver to him a certificate of sale and payment. Such certificate shall state that all right, title and interest which the debtor had in and to such property on the day the execution or attachment was levied, and any right, title and interest since acquired, is transferred to the purchaser.

(6) **Real property.** Upon a sale of real property the officer shall give to the purchaser a certificate of sale, containing: (1) a particular description of the real property sold; (2) the price paid by him for each lot or parcel if sold separately; (3) the whole price paid; (4) a statement to the effect that all right, title, interest and claim of the judgment debtor in and to the property is conveyed to the purchaser; provided that where such sale is subject to redemption that fact shall be stated also. A duplicate of such certificate shall be filed for record by the officer in the office of the recorder of the county. The real property sold shall be subject to redemption, except where the estate sold is less than a leasehold of a two-years' unexpired term, in which event said sale is absolute.

(f) Redemption from sale.

(1) **Who may redeem.** Property sold subject to redemption, or any part sold separately, may be redeemed by the following persons or their suc-

cessors in interest: (1) the judgment debtor; (2) a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.

(2) **Redemption; how made.** At the time of redemption the person seeking the same may make payment of the amount required to the person from whom the property is being redeemed, or for him to the officer who made the sale, or his successor in office. At the same time the redemptioner must produce to the officer or person from whom he seeks to redeem, and serve with his notice to the officer: (1) a certified copy of the docket of the judgment under which he claims the right to redeem, or, if he redeems upon a mortgage or other lien, a memorandum of the record thereof certified by the recorder; (2) an assignment, properly acknowledged or proved where the same is necessary to establish his claim; (3) an affidavit by himself or his agent showing the amount then actually due on the lien.

(3) **Time for redemption; amount to be paid.** The property may be redeemed from the purchaser within six months after the sale on paying the amount of his purchase with 6 percent thereon in addition, together with the amount of any assessment or taxes, and any reasonable sum for fire insurance and necessary maintenance, upkeep, or repair of any improvements upon the property which the purchaser may have paid thereon after the purchase, with interest on such amounts, and, if the purchaser is also a creditor having a lien prior to that of the person seeking redemption, other than the judgment under which said purchase was made, the amount of such lien, with interest.

In the event there is a disagreement as to whether any sum demanded for redemption is reasonable or proper, the person seeking redemption may pay the amount necessary for redemption, less the amount in dispute, to the court out of which execution or order authorizing the sale was issued, and at the same time file with the court a petition setting forth the item or items demanded to which he objects, together with his grounds of objection; and thereupon the court shall enter an order fixing a time for hearing of such objections. A copy of the petition and order fixing time for hearing shall be served on the purchaser not less than two days before the day of hearing. Upon the hearing of the objections the court shall enter an order determining the amount required for redemption. In the event an additional amount to that theretofore paid to the clerk is required, the person seeking redemption shall pay to the clerk such additional amount within 7 days. The purchaser shall forthwith execute and deliver a proper certificate of redemption upon being paid the amount required by the court for redemption.

(4) **Subsequent redemptions.** If the property is redeemed by a creditor, any other creditor having a right of redemption may, within 60 days after the last redemption and within six months after the sale, redeem the property from such last redemptioner in the same manner as provided in the preceding subdivision, upon paying the sum of such last redemption, with three percent thereon in addition and the amount of any assessment or tax, and any reasonable sum for fire insurance and necessary maintenance, upkeep or repair of any improvements upon the property which the last redemptioner may have paid thereon, with interest on such amount, and, in addition, the amount of any lien held by such last re-

demptioner prior to his own, with interest. Written notice of any redemption shall be given to the officer and a duplicate filed with the recorder of the county. Similar notice shall be given of any taxes or assessments or any sums for fire insurance, and necessary maintenance, upkeep or repair of any improvements upon the property, paid by the person redeeming, or the amount of any lien acquired, other than upon which the redemption was made. Failure to file such notice shall relieve any subsequent redemptioner of the obligation to pay such taxes, assessments, or other liens.

(5) **Where no redemption is made.** If no redemption is made within six months after the sale, the purchaser or his assignee is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed and no other redemption by a creditor has been made and notice thereof has been given, the last redemptioner, or his assignee, is entitled to a sheriff's deed at the expiration of six months after the sale. If the judgment debtor redeems, he must make the same payments as are required to effect a redemption by a creditor. If the debtor redeems, the effect of the sale is terminated and he is restored to his estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, duly acknowledged. Such certificate must be filed and recorded in the office of the county recorder where the property is situated.

(6) **Rents during period of redemption.** The purchaser from the time of sale until a redemption, and a redemptioner from the time of his redemption until another redemption, is entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If such purchaser or his assigns shall for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may, within sixty days after such demand, bring an action to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action the right of redemption is extended to such redemptioner or debtor.

(g) **Remedies of purchaser.**

(1) **For waste.** Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, upon motion, with or without notice, of the purchaser, or his successor in interest. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs or buildings thereon or to use wood or timber

on the property therefor, or for the repair of fences, or for fuel for his family while he occupies the property. After his estate has become absolute, the purchaser or his successor in interest may maintain an action to recover damages for injury to the property by the tenant in possession after sale and before possession is delivered under the conveyance.

(2) **Where purchaser fails to obtain possession of property or is dispossessed thereof or evicted therefrom.** Where, because of irregularities in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, or because of the reversal or discharge of the judgment, a purchaser of property sold on execution, or his successor in interest, fails to obtain the property or is dispossessed thereof or evicted therefrom, the court having jurisdiction thereof shall, on motion of such party and after such notice to the judgment creditor as the court may prescribe, enter judgment against such judgment creditor for the price paid by the purchaser, together with interest. In the alternative, if such purchaser or his successor in interest, fails to recover possession of any property or is dispossessed thereof or evicted therefrom in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on motion of such party and after such notice to the judgment debtor as the court may prescribe, revive the original judgment in the name of the petitioner for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and the judgment so revived shall have the same force and effect as would an original judgment of the date of the revival.

(h) **Contribution and reimbursement; how enforced.** When upon an execution against several persons more than a pro rata part of the judgment is satisfied out of the proceeds of the sale of the property of one, or one of them pays, without a sale, more than his proportion, and the right of contribution exists, he may compel such contribution from the others; and where a judgment against several is upon an obligation of one or more as security for the others, and the surety has paid the amount or any part thereof, by sale of property or otherwise, he may require reimbursement from the principal. The person entitled to contribution or reimbursement shall, within one month after payment, or sale of his property in the event there is a sale, file in the court where the judgment was rendered a notice of such payment and his claim for contribution or reimbursement. Upon the filing of such notice the clerk must make an entry thereof in the margin of the docket which shall have the effect of a judgment against the other judgment debtors to the extent of their liability for contribution or reimbursement.

(i) **Payment of judgment by person indebted to judgment debtor.** After the issuance of an execution and before its return, any person indebted to the judgment debtor may pay to the officer the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the officer's receipt is a sufficient discharge for the amount paid.

(j) **Where property is claimed by third person.** If an officer shall proceed to levy any execution on any goods or chattels claimed by any person other than the defendant, or should he be requested by the judgment creditor so to do, such officer may require the judgment creditor to give an undertaking, with good and sufficient sureties, to pay all costs and damages that he may

sustain by reason of the detention or sale of such property; and until such undertaking is given, the officer may refuse to proceed against such property.

(k) **Order for appearance of judgment debtor; arrest.** At any time when execution may issue on a judgment, the court from which an execution might issue shall, upon written motion of the judgment creditor, with or without notice as the court may determine, issue an order requiring the judgment debtor, or if a corporation, any officer thereof, to appear before the court or a master at a specified time and place to answer concerning his or its property. A judgment debtor, or if a corporation, any officer thereof, may be required to attend outside the county in which he resides, but the court may make such order as to mileage and expenses as is just. The order may also restrain the judgment debtor from disposing of any nonexempt property pending the hearing. Upon the hearing such proceedings may be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as on execution against such property.

In aid of an order requiring the attendance of the judgment debtor, the court may, upon satisfactory proof by affidavit or otherwise, that there is danger of the debtor's absconding, order the sheriff to arrest the debtor and bring him before the court, and may order such judgment debtor to enter into an undertaking with sufficient sureties, that he will attend from time to time before the court or master, as may be directed during the pendency of the proceedings and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to jail.

(l) **Examination of debtor of judgment debtor.** At any time when execution may issue on a judgment, upon proof by affidavit or otherwise to the satisfaction of the court that any person or corporation has property of such judgment debtor or is indebted to him in an amount exceeding fifty dollars, not exempt from execution, the court may order such person or corporation or any officer or agent thereof, to appear before the court or a master at a specified time and place to answer concerning the same. Witness fees and mileage, if any, may be awarded by the court.

(m) **Order prohibiting transfer of property.** If it appears that a person or corporation, alleged to have property of the judgment debtor or to be indebted to him in an amount exceeding fifty dollars, not exempt from execution, claims an interest in the property adverse to such judgment debtor or denies such indebtedness, the court may order such person or corporation to refrain from transferring or otherwise disposing of such interest or debt until such time as may reasonably be necessary for the judgment creditor to bring an action to determine such interest or claim and prosecute the same to judgment. Such order may be modified or vacated by the court at any time upon such terms as may be just.

(n) **Witnesses.** Witnesses may be required to appear and testify in any proceedings brought under Subdivisions (k) and (l) of this rule in the same manner as upon the trial of an issue.

(o) **Order for property to be applied on judgment.** The court or master may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

(p) **Appointment of receiver.** The court may appoint a receiver of the property of the judgment debtor, not exempt from execution, and may forbid

any transfer or other disposition thereof or interference therewith until its further order therein; provided that before any receiver shall be vested with the real property of the judgment debtor a certified copy of his appointment shall be recorded in the office of the recorder of the county in which any real estate sought to be affected thereby is situated.

Compiler's Notes. — Subdivision (a) of this rule was originally taken from Rule 69(a), F.R.C.P.

Cross-References. — Contempt, Chapter 32 of Title 78.

Contribution among joint tort-feasors, §§ 78-27-39 to 78-27-43.

County recorder, Chapter 21 of Title 17.

Duty to answer questions, § 78-24-10.

Entry of a judgment after the death of a party, Rule 58A(e).

Execution and levy against decedent or personal representative prohibited, § 75-3-812.

Fee, additional filing fee for cases where execution requested, § 21-2-2.

Process in behalf of and against persons not parties, Rule 71A.

NOTES TO DECISIONS

ANALYSIS

Contents of writ.

—Reissuance of first writ as second writ.

A clerk may, under circumstances which mandate his issuance of a second writ of execution, reissue the first writ by acknowledging his initial signature thereon and using a seal previously stamped, and by so doing, he has fulfilled the formalities required by Subdivision (b) that the writ be issued in the name of the state of Utah, sealed with the court's seal, and subscribed by the clerk. Heath Tecna Corp. v. Sound Sys. Int'l, 588 P.2d 169 (Utah 1978).

Contribution and reimbursement.

—Co-guarantors of installment debt.

Where plaintiff co-guarantor of installment debt had paid less than half of the outstanding balance due, his action against his co-guarantors for contribution was premature since the right to contribution depends upon performance by one of more than his proportionate share. Gardner v. Bean, 677 P.2d 1116 (Utah 1984).

—Joint owners.

Under this rule there is no authority for distinguishing between the rights of redemption of a judgment lienholder, whose judgment was against only one joint owner, and of a lienholder whose lien covers the entire ownership. Tanner v. Lawler, 6 Utah 2d 268, 311 P.2d 791 (1957).

Where decedent had actively participated in purchase and furnishing of mobile home to be used for the mutual benefit of himself and plaintiff, and he and plaintiff had discussed marriage and in fact had resided in the mobile home together, trial court was justified in concluding that the decedent was the joint purchaser of the home, that there was a benefit given to him at his request, and that consequently he received consideration for becoming a co-obligor on the purchase contract. Winkel v. Call, 603 P.2d 808 (Utah 1979).

Enforcement of judgment.

—Method.

A levy of execution is ordinarily the only proper method to enforce a judgment lien, unless the case involves special circumstances, such that execution does not lie, in which case the procedure for enforcement is an equitable action to foreclose the judgment lien. Belnap v. Blain, 575 P.2d 696 (Utah 1978).

—Right of winning party.

Party in whose favor judgment was rendered had a clear right to have it enforced, and if anyone attempted to interfere with that right it was also the clear duty of the court, in case a proper application was made, to enforce the judgment. Ketchum Coal Co. v. Christensen, 48 Utah 214, 159 P. 541 (1916); Ketchum Coal Co. v. District Court, 48 Utah 342, 159 P. 737, 4 A.L.R. 619 (1916).

Issuance of writ.

—Partial assignment of judgment.

Partial assignment of a judgment and the execution sale held thereunder were valid where the judgment debtor had not paid any portion of the sizeable judgment against him and had not been subjected to collection efforts by the original judgment creditor; any amounts recovered by the assignee apparently inured to the benefit of the assignor; and there was no claim of prejudice to the judgment debtor resulting from the partial assignment or from the execution sale based on the partial assignment. Gilroy v. Lowe, 626 P.2d 69 (Utah 1981).

—Stay.

——Bankruptcy.

Failure to assert bankruptcy as a defense is not fatal to a later successful assertion of a discharge that postdates the judgment, so that a stay of execution of the judgment is proper based upon such discharge. Upton v. Heiselt Constr. Co., 3 Utah 2d 170, 280 P.2d 971 (1955).

—Timeliness.

Where the judgment was rendered on October 22, 1971, and the execution sale took place on Monday, October 22, 1979, the execution sale was timely. Gilroy v. Lowe, 626 P.2d 469 (Utah 1981).

——Tolling.

Part payment or written acknowledgment of a judgment does not toll the eight-year limitation period for serving process to enforce a judgment by writ of execution. Yergensen v. Ford, 16 Utah 2d 397, 402 P.2d 696 (1965).

Order for appearance of judgment debtor.

—Issues raised.

——Constitutionality.

Taxpayer who did not appeal a judgment against him for underpayment of income taxes could not raise the issue of the constitutionality of the tax in a supplemental proceeding whose purpose was to determine the location and amount of taxpayer's property for purpose of satisfying the judgment. State Tax Comm. v. Wright, 596 P.2d 634 (Utah 1979).

Proceedings on sale of property.

—Applicability of rule.

——Partition.

Sales of property in partition proceedings should be governed by the statutes governing partition, and not by Subdivision (e). Gillmor v. Gillmor, 657 P.2d 736 (Utah 1982).

—Conduct of sale.

——Separation of parcels.

Description in deed of land as "Lots 1 and 2 of block 28, Plat A Manti City Survey" did not serve to separate an otherwise unified parcel into two parcels subject to separate sales under Subdivision (e)(3). Commercial Bank v. Madsen, 120 Utah 519, 236 P.2d 343 (1951).

Certified copy of a certificate of sale contained in a supplemental record was sufficient, on appeal, to support trial court's determination that a parcel of real estate was sold separately where the record contained conflicting evidence on the issue. Bawden & Assocs. v. Smith, 646 P.2d 711 (Utah 1982).

——Setting aside.

A sale which has been regularly held and fairly conducted should not be set aside merely because a higher bid is offered later. Commercial Bank v. Madsen, 120 Utah 519, 236 P.2d 343 (1951).

——Time of sale.

Sheriff conducting foreclosure sale may, in his discretion, set such time for sale as he chooses so long as it is within the limit prescribed by this section. Commercial Bank v. Madsen, 120 Utah 519, 236 P.2d 343 (1951).

—Postponement.

——From Saturday or day before holiday.

When a sale which was to be held on a Saturday or the day before a holiday is postponed for one day, such that additional notice is not necessary under Subdivision (e)(2), the postponement is, pursuant to Rule 6(a), until the next business day. Mower v. Bohmke, 9 Utah 2d 52, 337 P.2d 429 (1959).

Redemption.

—Amount to be paid.

——Payment into court.

The intent of Subdivision (f)(3) is to allow a redemptioner to pay the funds into court so that the holder of the certificate of sale cannot clog the equity of redemption by refusing to cooperate in the redemption process. Granada, Inc. v. Tanner, 712 P.2d 254 (Utah 1985).

—Construction of rule.

Foreclosure is in the nature of a forfeiture, which the law does not favor, and therefore, rules and statutes dealing with redemption are remedial in character and should be given a liberal construction. United States v. Loosley, 551 P.2d 506 (Utah 1976).

—Effect.

——Restoration of property to same condition.

The general effect of a redemption by the judgment debtor or his successor is that it restores the property to the same condition as if no sale had been attempted. Bennion v. Amoss, 530 P.2d 810 (Utah 1975).

——Waiver of irregularities.

By redeeming the property, debtor waived and was estopped from asserting any irregularities in the foreclosure sale. Bennion v. Amoss, 530 P.2d 810 (Utah 1975).

—How made.

——Defects in tender.

Where at time of tendered redemption payment by assignee of mortgagee to purchasers at sheriff's sale no grounds for rejection were made, subsequent claim that assignee's failure to include copy of judgment and amount of lien with payment was not deemed sufficient reason to reject tender. United States v. Loosley, 551 P.2d 506 (Utah 1976).

——Substantial compliance.

If a debtor, acting in good faith, has substantially complied with the procedural requirements of this rule in such a manner that the lender mortgagee is not injured or adversely affected, and is getting what he is entitled to, the law will not aid in depriving the mortgagor of his property for mere falling short of exact compliance with technicalities. United States v. Loosley, 551 P.2d 506 (Utah 1976).

—Timeliness.

——Extension of time.

A court, sitting in equity, may in appropriate instances extend the period for redemption

from sales on execution. Mollerup v. Storage Sys. Int'l, 569 P.2d 1122 (Utah 1977).

The matter of bankruptcy after foreclosure and sale does not constitute grounds for extending the time of redemption from sales on execution. Mollerup v. Storage Sys. Int'l, 569 P.2d 1122 (Utah 1977).

—Final adjudication of rights.

Where assignee of mortgagor who purchased prior to institution of foreclosure was not made a party to the foreclosure proceedings and his rights were not finally adjudicated until several months after foreclosure, he had six months after such adjudication in which to redeem. Carlquist v. Coltharp, 67 Utah 514, 248 P. 481, 47 A.L.R. 765 (1926).

—Who may redeem.

——Assignee of attorney's lien.

Assignee of recorded attorney's lien has right to redeem property subject to that lien from the purchaser at sheriff's sale following mortgage foreclosure of the property. Downey State Bank v. Major-Blakeney Corp., 578 P.2d 1286 (Utah 1978).

——Assignee of creditor.

Where a grantee of the mortgagor took the assignment of a sheriff's sale certificate from a judgment creditor in a foreclosure suit, instead of taking a certificate of redemption, the assigned interest was subject to the redemption rights of the assignee of a creditor having a judgment lien subsequent to the foreclosure lien. Tanner v. Lawler, 6 Utah 2d 84, 305 P 2d 882, modified on another point, 6 Utah 2d 268, 311 P.2d 791 (1957).

——Judgment debtor.

A judgment debtor can redeem from a judgment sale although he has parted with title prior to the sale. Clawson v. Moesser, 535 P.2d 77 (Utah 1975).

Remedies of purchaser.

—Dispossession.

——Scire facias.

Intent and purpose of statute on remedies of dispossessed purchaser was to afford the relief provided for by the common-law writ of scire facias pertaining to the revival of judgments. Continental Nat'l Bank & Trust Co. v. John H. Seely & Sons Co., 94 Utah 357, 77 P.2d 355, 115 A.L.R. 543 (1938).

—Failure to obtain possession.

——Modification of judgment.

Subdivision (g)(2) was not applicable where plaintiff obtained the property but wanted a modification of the judgment. Pitts v. McLachlan, 567 P.2d 171 (Utah 1977).

To whom writ directed.

—Judicial sale.

——Constables.

Rule 4(m) merely provides that a constable is authorized to serve notice of an execution on a judgment and does not constitute authority for a constable to conduct judicial sales, which authority, pursuant to Subdivision (b) of this rule, is specifically given to sheriffs. Larsen v. Associates Fin. Serv. Co., 564 P.2d 1128 (Utah 1977).

Cited in Utah Poultry & Farmers Coop. v. Bonie, 13 Utah 2d 13, 367 P.2d 860 (1962); First of Denver Mtg. Investors v. C.N. Zundel & Assocs., 600 P.2d 521 (Utah 1979).

COLLATERAL REFERENCES

Utah Law Review. — Equitable Considerations of Mortgage Foreclosure and Redemption in Utah: A Need for Remedial Legislation, 1976 Utah L. Rev. 327.

Am. Jur. 2d. — 30 Am. Jur. 2d Executions §§ 17 et seq., 58 et seq., 72, 105, 115, 208, 221 et seq., 545, 595, 596, 828, 834, 835, 850 et seq., 865 et seq.; 47 Am. Jur. 2d Judicial Sales §§ 82 et seq., 99 et seq., 115 et seq., 222, 246 et seq., 250 et seq., 283 et seq., 287, 288, 318 et seq., 339, 340, 341 et seq., 344 et seq.; 78 Am. Jur. 2d Waste § 9.

C.J.S. — 33 C.J.S. Executions §§ 1, 2, 44 et seq., 63 et seq., 69 et seq., 78, 94 et seq., 176, 201 et seq., 209, 211, 218 et seq., 224, 253, 254, 256 et seq., 257, 261, 269 et seq., 304, 305, 306 et seq., 312, 333, 362, 369, 370, 376, 383, 387 et seq., 407 et seq.; 49 C.J.S. Judgments § 34; 93 C.J.S. Waste § 12.

A.L.R. — Construction and effect of provision for execution sale on short notice, or sale in advance of judgment under writ of attachment, where property involved is subject to decay or depreciation, 3 A.L.R.3d 593.

Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons, or the like, 6 A.L.R.3d 1179.

Admissibility, in civil case, of expert or opinion evidence as to proposed witness' inability to testify, 11 A.L.R.3d 1360.

Death of creditor or obligee, validity and effect of agreement that debt or legal obligation contemporaneously or subsequently incurred shall be canceled by, 11 A.L.R.3d 1427.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one of the joint depositors, 11 A.L.R.3d 1465.

Propriety and effect of corporation's appear-

ance pro se, through agent who is not attorney, 19 A.L.R.3d 1073.

Allowance of mileage or witness fees with respect to witnesses who were not called to testify or not permitted to do so when called, 22 A.L.R.3d 675.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution, and foreclosure, 27 A.L.R.3d 863.

Modification of judgment, execution sale as affected by, 32 A.L.R.3d 1019.

Right of guarantor or surety, in order to avoid paying amount in excess of his proportionate share, to compel co-guarantors or cosureties to pay their share to creditor, 38 A.L.R.3d 680.

What is "necessary" furniture entitled to exemption from seizure for debt, 41 A.L.R.3d 607.

Right of junior mortgagee whose mortgage covers only a part of land subject to first mortgage to redeem pro tanto, where he was not bound by foreclosure sale, 46 A.L.R.3d 1362.

Wrongful execution against business property, injury to credit standing, reputation, solvency, or profit potential as elements of damage resulting from, 55 A.L.R.3d 911.

Mortgaged property, what constitutes waste justifying appointment of receiver of, 55 A.L.R.3d 1041.

Failure or refusal of witness to give testimony, tort or statutory liability for, 61 A.L.R.3d 1297.

Garnishee's duty to give debtor notice of garnishment prior to delivery of money without judgment against the garnishee on the debt, 38 A.L.R.4th 824.

Liquor license as subject to execution or attachment, 40 A.L.R.4th 927.

Lien of judgment on excess value of homestead, 41 A.L.R.4th 292.

Constitutionality, construction, and application of statute as to effect of taking appeal, or staying execution, on right to redeem from execution or judicial sale, 44 A.L.R.4th 1229.

Right of interested party receiving due notice of tax sale or of right to redeem to assert failure or insufficiency of notice to other interested party, 45 A.L.R.4th 447.

Judgment lien or levy of execution on one joint tenant's share or interest as severing joint tenancy, 51 A.L.R.4th 906.

Key Numbers. — Execution ⇐ 1, 3, 35 et seq., 64, 67, 68, 69, 75, 78 et seq., 90, 127 et seq., 185, 222, 223, 226, 238, 241, 281, 282, 285 et seq , 291, 293, 295, 296 et seq., 301, 305 et seq , 348, 373 et seq., 385 et seq., 390, 395, 402, 407 et seq., 421 et seq.; Judgments ⇐ 532; Waste ⇐ 12.

Rule 70. Judgment for specific acts; vesting title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance and upon order of the court, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

Compiler's Notes. — This rule is similar to Rule 70, F R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d Specific Performance § 179 et seq.

C.J.S. — 81 C.J.S. Specific Performance §§ 168-170.

A.L.R. — Lis pendens in suit to compel stock transfer, 48 A.L.R.4th 731.

Key Numbers. — Specific Performance ⇐ 131, 132.